

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF &  
APPENDIX**



# 74-1079

To be argued by  
LOUIS R. AIDALA

B  
Pgs  
6

## United States Court of Appeals

### FOR THE SECOND CIRCUIT

Docket No. 74-1079

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

RAMON RIVERA,

*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

### APPELLANT'S BRIEF AND APPENDIX



LOUIS R. AIDALA  
*Attorney for Defendant-Appellant*  
1250 Broadway  
New York, New York 10001  
(212) 736-8088

HENRY J. BOITEL  
*Of Counsel*

PAGINATION AS IN ORIGINAL COPY

## INDEX

Questions Presented for Review . . . . .	iv
Preliminary Statement . . . . .	1
Statement of the Case . . . . .	2
Argument . . . . .	7

<u>Point I.</u> The Defendant was Deprived of a Fair Trial when the Court Revealed to the Jury that the Two Co-defendants Had Entered Pleas of Guilty in the Midst of the Trial. That Revelation was Particularly Prejudicial Since, for all Intensive Purposes, It Established an Essential Element of the Charges against the De- fendant - The Existence of a Conspiracy . . . . .	7
--	---

<u>Point II.</u> The Trial Court Improperly Curtailed the Defendant's Right, During Cross-examination of the Principal Witness Against Him, to Impeach that Witness' Credi- bility by Reference to the Sub- stance of the Witness' Prior Criminal Conduct . . . . .	12
--	----

<u>Point III.</u> It was Unfairly Preju- dicial when Government Counsel, Through his Questioning, Indi- cated to the Jury that the De- fendant Had a Prior Criminal Re- cord and Prior Convictions . . . . .	16
---	----

Conclusion . . . . .	18
----------------------	----

## INDEX TO APPENDIX

Docket Entries . . . . .	A 1
Indictment . . . . .	A 3
Excerpts from Trial Transcript . . . . .	A 5

Judge's Charge to the Jury . . . . .	A 27
Exceptions to Charge . . . . .	A 58
Jury Request No. 1 . . . . .	A 62
Jury Request No. 2 . . . . .	A 62
Jury's Verdict . . . . .	A 65
Minutes of Sentence . . . . .	A 68
Judgment and Commitment . . . . .	A 75

#### TABLE OF AUTHORITIES

##### Cases:

<u>Alford v. United States</u> , 282 U.S. 687 (1931) . .	15
<u>Brookhart v. Janis</u> , 384 U.S. 1 (1966) . . . . .	15
<u>Bruton v. United States</u> , 391 U.S. 123 (1968) . .	9, 12
<u>Davenport v. United States</u> , 260 F. 2d 591 (9th Cir., 1958), <u>cert. denied</u> , 359 U.S. 909 . . . . .	8 fn.
<u>Davis v. Alaska</u> , - U.S. - , 14 CrL. 3117 (February 27, 1974) . . . . .	15
<u>Mackreth v. United States</u> , 103 F. 2d 495 (5th Cir., 1939) . . . . .	17
<u>Michelson v. United States</u> , 339 U.S. 469 (1948)	18
<u>Nigro v. United States</u> , 117 F. 2d 624 (8th Cir., 1941) . . . . .	8
<u>Richards v. United States</u> , 193 F. 2d 554 (10th Cir., 1951), <u>cert. denied</u> , 343 U.S. 930) . . . . .	8, fn.
<u>Smith v. Illinois</u> , 390 U.S. 129 (1968) . . . . .	15
<u>Wood v. United States</u> , 279 F. 2d 359 (8th Cir., 1960) . . . . .	8, fn.

<u>United States v. Conder</u> , 423 F. 2d 904 (6th Cir., 1970), <u>cert. denied</u> , 400 U.S. 958 . . . . .	14
<u>United States v. Crosby</u> , 294 F. 2d 928 (2nd Cir., 1961), <u>cert. denied</u> , 368 U.S. 984 . . . . .	8, fn.
<u>United States v. Kahn</u> , 381 F. 2d 824 (7th Cir., 1967) . . . . .	8, fn.
<u>United States v. Kelly</u> , 349 F. 2d 720 (2nd Cir., 1965) . . . . .	7-8

Statutes:

United States Code

18 U.S.C. § 2 . . . . .	2
21 U.S.C. § 812 . . . . .	2
21 U.S.C. § 841(a)(1) . . . . .	2
21 U.S.C. § 841(b)(1)(a) . . . . .	2
21 U.S.C. § 846 . . . . .	2

Other Authorities:

<u>Rule 608(b) - Proposed Rules of Evi-</u> <u>dence for United States</u> <u>Courts and Magistrates</u> . . .	15
<u>Wigmore, Evidence</u> , § 57 (3rd Ed.) . . . .	17

QUESTIONS PRESENTED FOR REVIEW

1. Was the defendant deprived of a fair trial and of his right to be confronted by the witnesses against him by the revelation to the jury that the two co-defendants plead guilty after the trial had commenced?

2. Did the trial Court improperly curtail the defendant's right to impeach the credibility of the chief prosecution witness?

3. Was it prejudicially improper for the prosecutor to indicate, by his questioning of a prosecution witness, that the defendant had a prior criminal record which included prior convictions?

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

Docket No. 74-1079

---

UNITED STATES OF AMERICA,  
Appellee,

-v.-

RAMON RIVERA,  
Defendant-Appellant.

---

On Appeal From The United States District Court  
For The Southern District Of New York

---

---

APPELLANT'S BRIEF AND APPENDIX

---

---

PRELIMINARY STATEMENT

Ramon Rivera appeals from a judgment of conviction entered against him after a jury trial before the Hon. Marvin E. Frankel in the United States District Court for the Southern District of New York. Appellant was convicted upon each count of a two count indictment, which charged him and two others with the crimes of possessing one eighth of a kilogram of cocaine with

intent to distribute same [21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(a) and 18 U.S.C. § 2], and conspiracy to do so [21 U.S.C. § 846]. On January 4, 1974, appellant was sentenced to a term of two years imprisonment on each, to be served concurrently, and to be followed by a three year term of special parole. He is presently serving that sentence.\*

STATEMENT OF THE CASE\*\*

The Government's chief witness was one, Anibal Romeo, a paid Government informant. It appears that prior to the events of this case, Romeo was arrested by Federal authorities on a Federal narcotics charge. In an effort to secure consideration from the Court with respect to that charge, he agreed to act as a Government informant. He subsequently became involved in some five or six cases, and was paid \$ 400 or \$ 500 by the Government with regard to each case. He has had no other source of income (Tr. 25, 63-64).

According to Romeo, as of September 25, 1973, he had known the appellant Rivera [hereinafter, Rivera], for approximately six months. On that date, he allegedly

\* The co-defendants, Alfredo Angrelo and Gregorio Castillo, commenced trial with the appellant, but entered pleas of guilty prior to the termination of the trial (see Point I, infra, at p. 7 ).

\*\* This Statement of the Case does not purport to be an exhaustive analysis of the trial proof since the issues raised on appeal go not to the sufficiency of the evidence, but rather to certain prejudicial errors which appellant submits deprived him of a fair trial.

met Rivera on the street, and during their ensuing conversation, Rivera agreed to attempt to obtain for Romeo a quarter kilogram of cocaine (Tr. 25-27). It was arranged that Romeo would call Rivera at 2:30 P.M., at Romeo's room at the Park Plaza Hotel. Later that day, Rivera reported this conversation to Agent Gray of the Bureau of Narcotics and Dangerous Drugs. It was arranged that Romeo would make the telephone call to Rivera from the BNDD office (Tr. 28-29).

The telephone conversation occurred at the appointed time, and was followed by a second such conversation at approximately 2:00 P.M. Both conversations were recorded and were introduced into evidence.\*

During the first conversation, it was arranged that Romeo would meet Rivera at Rivera's hotel at 4:30 P.M. that day so that Rivera could bring Romeo to meet someone. Rivera allegedly sought to impress upon Romeo the necessity that he "have the money."

\* Government Exhibits 3a, 4a and 5a (see Tr. 407), were the actual tape recordings of the two conversations indicated in the text, supra, as well as a later recording which resulted from the transmissions from a Kel transmitter worn by Romeo during subsequent events of the case. Government Exhibit 12 is a typewritten transcript of the translation (Spanish to English) of material which appeared on the three tapes.

The second conversation was a confirmation of the arrangements made during the first conversation. During the course of the second conversation, Rivera allegedly said: "Over there it's good because there's one, there's two Cuban partners of mine, good partners of mine, who have stones, you hear me, and you can then work with good stuff" (Government Exhibit 12, p. 6).

At the appointed time, Romeo, driven by an undercover special agent, Palombo, arrived at Rivera's hotel where Rivera joined Romeo, and the two men went by taxi to 136th Street and Broadway (Tr. 38). Rivera allegedly told Romeo: "We are going to meet these people, you take a look at it and if you like it you buy it and give me my part" (Tr. 39). At 139th Street, the two men were joined by a BNDD agent, Nieves, who was introduced by Romeo to Rivera as being Romeo's partner (Tr. 42-43). Following a 10 minute conversation, the three men walked up to 140th Street and Broadway and looked in the window of Jack's Bar. They then walked to 137th Street where they were eventually joined by the co-defendants Agrelo and Castillo (Tr. 42-44). Agrelo agreed to provide the requested cocaine, in exchange for the purchase price, and the transaction was to occur at 9 P.M. that evening (Tr. 44-48).

At 9 P.M., Romeo and Nieves met Rivera and Agrelo at 139th Street and Broadway. Following further bargaining over the price with Agrelo, it was agreed that Agrelo would go to Jack's Bar and would give a signal when it was time to come and look at the cocaine. Thereafter, Agrelo gave the signal, and Romeo proceeded to the bar, leaving Agent Nieves and Rivera behind (Tr. 52-54). At the bar, Romeo proceeded to the men's room with Castillo and Agrelo, and was there shown two plastic bags containing white powder, apparently for the purpose of establishing that they actually had the drugs (Tr. 54-56).

Thereafter, the three men exited the bathroom and proceeded to a corner of the bar, with Castillo still in possession of the two bags (Tr. 56). Then Romeo left the bar and joined Agent Nieves and Rivera across the street, telling them what had transpired (Tr. 60).

Agent Michael Gray of the BNDD corroborated Romeo's testimony with regard to the telephone conversations. He also alleged that he had maintained a surveillance of the movements of the various individuals described in Romeo's testimony (Tr. 138, et seq.).

Agent Nieves (Tr. 234, et seq.) corroborated

Romeo's testimony concerning the events in which Nieves was involved. Nieves further testified that, after Romeo joined him across the street, Nieves gave a pre-arranged signal to a number of surveillance agents who thereupon swooped onto the scene and arrested all concerned (Tr. 251).

None of the arrested men had any packages of powder in his possession. A search of Jack's Bar was conducted, and a package of white powder, which later proved to be cocaine, was discovered in a metal wastepaper basket in the ladies room of the bar (Tr. 270).

During the course of the above noted events, Romeo was wearing a Kel transmitter which sporadically transmitted portions of the conversations to which he was a party. Those portions are reproduced in Exhibit 12 at pp. 8-24.

## ARGUMENT

### POINT I.

THE DEFENDANT WAS DEPRIVED OF A FAIR TRIAL WHEN THE COURT REVEALED TO THE JURY THAT THE TWO CO-DEFENDANTS HAD ENTERED PLEAS OF GUILTY IN THE MIDST OF THE TRIAL. THAT REVELATION WAS PARTICULARLY PREJUDICIAL SINCE, FOR ALL INTENTS AND PURPOSES, IT ESTABLISHED AN ESSENTIAL ELEMENT OF THE CHARGES AGAINST THE DEFENDANT - THE EXISTENCE OF A CONSPIRACY.

In United States v. Kelly, 349 F. 2d 720 (2nd Cir., 1965), Judge Medina, writing the majority opinion, forcefully expressed himself as follows:

"Nor was it error to permit a co-defendant Jules Bean to plead guilty during the progress of the trial. United States v. Crosby, 2nd Cir., 1961, 294 F. 2d at 928, 948, cert. denied, sub. nom. Mittelman v. United States, 1962, 368 U.S. 984; United States v. Aronson, 2nd Cir., 1963, 319 F. 2d 48, 52, cert. denied, 375 U.S. 920; United States v. Dardi, 2nd Cir., 1964, 330 F. 2d 316, 333, cert. denied, 379 U.S. 845; Koolish v. United States, 8th Cir., 1965, 340 F. 2d 513, 529-531, cert. denied, 1965, 85 S.Ct. 1805. It is to be noted, however, that in this case the guilty plea was not made in the presence of the jury, nor were the jurors in any way apprised of the fact it had been made. While the statement in Crosby, also quoted verbatim in the later cases above cited, goes on to say that there is no impropriety or error 'even for the jury to be present when the pleas are entered' the writer of this opinion wishes to record his disagreement with this view. It may

well be that the rule permitting such pleas to be entered in the full view of the jury, and even by pre-arrangement with the prosecutor and the trial Judge, has been enforced in this Circuit for many years. If so, it is time to change the rule. If, as and when, during the progress of a joint trial, a co-defendant pleads guilty, the entry of such a plea cannot possibly be beneficial to the interests of the other defendants. In the absence of some very exceptional circumstance, such as the giving way to a sudden impulse on the part of the individual pleading guilty, the dramatic and emotional features attendant upon the entry of the plea in the presence of the jurors should be avoided. In the natural course of events, guilty pleas during joint trials ought to be anticipated. At least they cannot be avoided. It is the plain duty of the presiding Judge to do nothing to increase the possibility of prejudice to the remaining defendants." (349 F. 2d at 767) [Emphasis added]

To the same effect: Nigro v. United States, 117 F. 2d 624, 632 (8th Cir., 1941).

Although this Court and others have held that it is permissible for a jury to be advised that co-defendants have entered a plea of guilty,\* it is of significance to note that the bulk of such authority preceded the decision of the Supreme Court of the United

\* See: United States v. Crosby, 294 F. 2d 928, 948 (2nd Cir., 1961), cert. denied, 368 U.S. 984; United States v. Kahn, 381 F. 2d 824, 836-838 (7th Cir., 1967); Wood v. United States, 279 F. 2d 359, 363 (8th Cir., 1960); Davenport v. United States, 260 F. 2d 591, 595-596 (9th Cir., 1958), cert. denied, 359 U.S. 909; Richards v. United States, 193 F. 2d 554, 556 (10th Cir., 1951), cert. denied, 343 U.S. 930.

States in Bruton v. United States, 391 U.S. 123 (1968).

Bruton held that it was prejudicial error for the trial Court to admit into evidence at a joint trial the confession of a co-defendant implicating the defendant, notwithstanding a clear, concise and understandable instruction that the confession could only be used against the co-defendant, and must be disregarded with respect to the defendant. It is true that, on its face, a guilty plea, standing alone, inculcates only the one who has plead guilty. However, where, as here, 1) the charge is one of conspiracy; 2) the defense is predicated upon a challenge of the credibility of the prosecution's chief witness; and 3) the defendant is shown to have been with the pleading co-defendants at or about the short, but central, time, then the joint guilty plea, in the midst of trial, takes on an overwhelming significance as to the jurors. They have been advised, without the benefit of direct testimony or cross-examination, that a conspiracy did, in fact, exist, and that the government witness was truthful in his testimony implicating the co-defendants.

We have reproduced in the appellant's appendix, at pp. A. 19-24, the relevant portions of the trial transcript. When it appeared that the co-defendants were

about to plead guilty, the trial Court indicated that he was going to advise the jury of the pleas, but requested the views of defense counsel. Defense counsel responded that he had never been confronted with a similar situation and was uncertain as to the proper course (A. 19). The following colloquy then ensued:

"The Court: Well, joining you in thinking out loud, I believe that first we ought not to have the jury speculate because we don't know what this will cause, but, secondly, since it is a conspiracy which is the subject of Count 1, it requires the participation of more people than one, it seems to me that it would not be fair to have them here from day 1, and have them mysteriously disappear on day 2. I think Mr. Rivera is entitled to have an instruction, as I say, that his guilt or innocence is wholly separate, and is not affected by their pleas of guilty, but the Government is entitled to have the benefit of its proof there was a conspiracy, leaving the question whether he was in it or not.

"[Defense counsel]: The only problem I see, Judge, is that in some way the jury might use the admissions of guilt on the part of these two defendants as establishing the conspiracy.

"The Court: Well, it is conceivable they might. I am going to instruct them they cannot consider the evidence of these pleas against Mr. Rivera but I don't see how else as a practical matter to handle that." (A. 19-20; emphasis added)

Thereafter, the Court agreed to instruct the

jury that the guilty pleas of the co-defendants should not be taken as evidence establishing that in fact a conspiracy existed between the two co-defendants and the defendant (A. 21), and the Court did so instruct the jury (A. 23-24).

We respectfully submit that counsel's prior expression of concern sufficiently preserved the point for review, and, if not, the revelation of the guilty pleas to the jury constituted plain error.

It is fundamental that the Government is burdened with responsibility of establishing every element of the crime charged beyond a reasonable doubt by means of evidence which can be subjected to analysis and cross-examination. By informing the jury that the two co-defendants, previously on trial, had abruptly entered pleas of guilty, the government's proof was immeasurably buttressed. Unlike the device of redacted confessions utilized in the post-Bruton era, the jury here was advised that the co-defendants had admitted the charges of the Indictment, for the Court, inter alia, told them: "Among the things that happened this morning were the decisions by Mr. Castillo and Mr. Agrelo to withdraw their pleas of not-guilty and enter pleas of guilty to the charges against them, so you can observe that

they are no longer present at the defense table" (A. 23).

To ask the jury to disregard the powerful implication of such a guilty plea is to engage in the type of wishful thinking which was rejected in Bruton (391 U.S. at 136-137).

It is, therefore, respectfully urged that the defendant was deprived of a fair trial, of his right to confrontation and cross-examination, and of his right to be convicted only upon properly admitted evidence. The judgment of conviction should not be permitted to stand.

#### POINT II.

THE TRIAL COURT IMPROPERLY CURTAILED THE DEFENDANT'S RIGHT, DURING CROSS-EXAMINATION OF THE PRINCIPAL WITNESS AGAINST HIM, TO IMPEACH THAT WITNESS' CREDIBILITY BY REFERENCE TO THE SUBSTANCE OF THE WITNESS' PRIOR CRIMINAL CONDUCT.

As is noted supra, at p. 2, the informant Romeo commenced his cooperation with the narcotics authorities following his own arrest upon narcotics charges. The indictment in that case was still pending at the time of the instant trial. Romeo admitted that he became an informant for the purpose of bettering his position with regard to those charges (Tr. 112-116). During the course of cross-examination, defense counsel

requested that the Government provide him with "whatever papers they have concerning the charges against this witness" (A. 5). He later made clear that he wished a copy of the indictment (A. 12). The Government later indicated that it was prepared to give defense counsel a copy of the indictment, but requested that the Court:

" . . . limit the amount of questioning that can be made by Mr. Aidala on the basis of this indictment. Mr. Aidala has gone into the fact that the defendant is indicted and that he does have a motive, if it can be construed as such by this jury, to lie. And to the extent to which this indictment goes into the charges against the defendant [i.e., the witness], he has plead not guilty to the indictment, 1) would prejudice the government's case and, 2) are unnecessary for the purpose for which the defense would use the fact that the witness is under indictment." (A. 13-13a)

Following further efforts by the prosecution to limit the cross-examination, the following colloquy ensued between defense counsel and the Court:

"[Defense counsel]: At this point, I haven't seen the indictment, and I don't know what may be - -

"The Court: You are as much in the dark as I am. I will rule that you may ask him about what he is accused of, but I am not going to let you ask whether he did those things.

"Defense Counsel: Of course, Judge. It is the discretion of the Court. Any prior bad acts that the witness has committed can be asked and gone into, which is within the discretion of the Court.

"The Court: I know. Whether it is discretionary or whatever, I am telling you I am not going to allow you to try that indictment. I think you have gone about as far as you need to go anyhow, and this whole discussion may be moot and this whole discussion is now terminated and when I hear the questions I will rule on them. Let us proceed." (A. 15)

Later, defense counsel literally sought to comply with the Court's ruling by offering into evidence a copy of the indictment which was then pending against Romeo. Upon objection by the prosecutor, the offer was rejected (A. 18).

Appellant respectfully submits that the Court's limitation upon cross-examination effectively deprived him of his right to cross-examine the key witness against him. Oddly enough, the usual rule is that the mere fact of an arrest or indictment may not be revealed to the jury since it does not show that the witness has, in fact, committed the act or acts with which he is charged. See, United States v. Conder, 423 F. 2d 904 (6th Cir., 1970), cert. denied, 400 U.S. 958.

However, an exception to that rule exists in the case of a prosecution witness against whom criminal

charges are pending. Indeed, the Supreme Court of the United States recently made clear that the refusal of a trial Court to permit the defense to cross-examine a prosecution witness concerning pending criminal charges against him constitutes "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it" Davis v. Alaska, - U.S. - , 14 CrL. 3117, 3120-3121 (February 27, 1974). See also: Brookhart v. Janis, 384 U.S. 1, 3 (1966); Smith v. Illinois, 390 U.S. 129, 131 (1968); Alford v. United States, 282 U.S. 687 (1931).

The rule of more general application is stated in Rule 608(b) of the Proposed Rules of Evidence for United States Courts and Magistrates (as approved by the Supreme Court of the United States on November 20, 1972):

"(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness, and not remote in time, be inquired into on cross-examination of the witness himself or on cross-examination of a witness who testifies to his character for truthfulness or untruthfulness."

It is respectfully submitted that, particularly within the context of this case, Romeo's responses to questions concerning whether he did, in fact, commit the crimes charged in the indictment, would have been "probative of truthfulness or untruthfulness." Moreover, if cross-examination of Romeo had been permitted, it would likely have indicated to the jury, not only the seriousness of his actual conduct, but also would have likely given some indication of the accessibility to him of large quantities of narcotics. This would have given the jury a basis for finding a reasonable doubt in the possibility that Romeo had been the source of the narcotics which were found in the present case.

POINT III.

IT WAS UNFAIRLY PREJUDICIAL  
WHEN GOVERNMENT COUNSEL, THROUGH  
HIS QUESTIONING, INDICATED TO THE  
JURY THAT THE DEFENDANT HAD A PRIOR  
CRIMINAL RECORD AND PRIOR CONVICTIONS.

Upon his arrest, the defendant allegedly gave an exculpatory version of events to an assistant United States Attorney who interrogated him (Tr. 294-300). The attorney testified as a government witness at the instant trial. At the conclusion of his direct examination, the following occurred:

"[Prosecutor]: Did you make any inquiries about his possible previous

criminal record?

"A. I did.

"[Prosecutor]: Did you ask him whether or not he had any convictions?

"[Defense counsel]: Objection, your Honor.

"The Court: Sustained.

"[Defense counsel]: I move for a mistrial at this time.

"The Court: That is denied. We are not interested in that subject at all. There is no information before the jury about that." (A. 25-26)

Notwithstanding the Court's admonitions to the jury, appellant respectfully submits that the line of questioning by the prosecutor necessarily conveyed to the jury the impression that the defendant had a prior criminal record which included convictions. As asserted in Wigmore, Evidence, Section 57, p. 456 (3rd Ed.):

" \* \* \* The deep tendency of human nature to punish, not because our victim is guilty of this crime, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of court. There are also indirect and more subtle disadvantages."

Revelation to a jury of a defendant's prior criminal record has been universally condemned. Mackreth v. United States, 103 F. 2d 495 (5th Cir., 1939); Michel-

son v. United States, 339 U.S. 469 (1948).

CONCLUSION

For all of the above reasons, the judgment of conviction should be reversed, and the appellant should be granted a new trial.

Respectfully submitted,

LOUIS R. AIDALA  
Attorney for Appellant

HENRY J. BOITEL  
Of Counsel

INDEX TO APPENDIX

Docket Entries . . . . .	A 1
Indictment . . . . .	A 3
Excerpts from Trial Transcript . . . . .	A 5
Judge's Charge to the Jury . . . . .	A 27
Exceptions to Charge . . . . .	A 58
Jury Request No. 1 . . . . .	A 62
Jury Request No. 2 . . . . .	A 62
Jury's Verdict . . . . .	A 65
Minutes of Sentence . . . . .	A 68
Judgment and Commitment . . . . .	A 75

# DOCKET ENTRIES

TITLE OF CASE

ATTORNEYS

THE UNITED STATES

For U. S.:

Daniel J. Pykett, AUSA

266-6394

ALFREDO AGRELO

GREGORIO, CASTILLO

✓ RALON RIVERA, a/k/a Tony, AKA Barry

For Defendant:

*Filed 18/74*

ABSTRACT OF COSTS

AMOUNT

CASH RECEIVED AND DISBURSED

DATE	NAME	RECEIVED	DISBURSED
07)			
Fine,			
Clerk,			
Marshal,			
Attorney, 553 1234			
RECORDS/CLERK T.21			
846,812,841(a)(1)			
distr. & possess, w/intent			
to distr. in a consp. to violate			
U.S. Narcotic laws,			
(Note Court)			

DATE

PROCEEDINGS

4-4-73	Filed indictment.
9-9-73	Agrelo(atty. present) Pleads not guilty. Defc. continued remanded in lieu of bail previously fixed by Magistrate. (\$50,000. cash or surety)
	Castillo(atty. present) Pleads not guilty. Defc. continued remanded in lieu of bail previously fixed by Magistrate. (\$25,000. cash or surety)
	Rivera-Court directs plea of not guilty. Defc. continued remanded in lieu of bail previously fixed by Magistrate. (\$10,000. cash or surety)
	Case assigned to Judge Frankel for all purposes.

Griesa, J.

DOCKET ENTRIES

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
10-26-73	Filed stip & order that deft Alfredo Agrello's time to make motions be extended to Nov.2-73----Frankel, J.		
11-19-73	Filed Govt's notice of readiness for trial		
11-27-73	ALL DEFTS - Jury trial begun..Atty's present.		
11-28-73	Trial cont'd. Interpreter sworn.		
11-29-73	Trial cont'd. Deft's AGRELO AND CASTILLO withdraw their pleas of not guilty and enter pleas of guilty to the indictment. Court accepts pleas and orders P.S.I. and sets Jan.2,1974 9:45 a.m. for sentence. Both Defts REMANDED Without bail.		
11-30-73	Trial cont'd.		
12-3-73	Trial cont'd & concluded. Jury returns a verdict of GUILTY as to both counts. P.S.I. ordered. Sentence Jan.4-74 REMANDED without bail.		
12-4-73	G.CASTILLO - Filed acknowledgment of rights.		
12-4-73	A.AGRELO - Filed acknowledgment of rights.		
12-4-73	A.AGRELO - Filed consent order that deft be permitted to marry Antoinette Rubio on Wed. 12-19-73.....Frankel, J.		
12-20-73	G.CASTILLO - Filed order that Halinas Bastianello as interpreter for a 2 hour period. fee not to exceed \$30.00....rule 28(B)...Frankel,J.		
1-2-74	ALFREDDO AGRELO - Filed Judgment(Atty. & interpreter present) The deft. is committed for imprisonment for a period of FIVE(5)YEARS on each of counts 1 and 2 to run concurrently with each other. Pursuant to the provisions of Section 841 of Ti.21, U.S.Code, deft is placed on Special Parole for a period of THREE YEARS on each of counts 1 and 2 to run concurrently with each other in addition to said term of imprisonment.The Court recommends that the deft be considered for treatment under the Drug Abuse Program under Public Law 92-293. The Court further recommends that the deft be considered for such aftercare as may be available after release for his		

### DOCKET ENTRIES


**.3.**

**FRANKEL, J.**

**.3.**

73 Cr.941

DATE	PROCEEDINGS
1-2-74	GREGORIO CASTILLO - Filed Judgment (Atty. present & interpreter present) The Deft is committed for imprisonment for a period of FIVE (5) YEARS on each of counts 1 and 2 to run concurrently with each other. Pursuant to the provisions of Section 841 of T1.21, U.S. Code, deft is placed on Special Parole for a period of THREE (3) YEARS on each of counts 1 and 2 to run concurrently with each other in addition to said term of imprisonment. The Court recommends that the deft be considered for treatment under the Drug Abuse Program under Public Law 92-293. The Court further recommends that the deft be considered for such aftercare as may be available after release for his drug addiction problem.....FRANKEL, J....Docketed 1-8-74 Deft is Remanded.
1-4-74	RAMON RIVERA - Filed Judgment (Louis Aidala, atty. present) the deft is committed for imprisonment for a period of TWO YEARS on each of counts 1 and 2 to run concurrently with each other...Pursuant to the provisions of section 841 of T1.21, U.S. Code, deft is placed on Special Parole for a period of THREE YEARS on each of counts 1 and 2 to run concurrently with each other in addition to said term of imprisonment.....Frankel, J. Docketed on 1-9-74
1-10-74	Filed transcript of record of proceedings, dated 11-29-73
1-16-74	RAMON RIVERA - Filed notice of appeal from judgment of Jan 4-74...Copy to U.S. Atty. and deft at Fed House of Detention 427 West St. NYC memo endorsed- Frankel J dtd: 1-18-74---"Permission to appeal in forma pauperis granted."
1-31-74	RIVERA - FILED STIPULATION DESIGNATING EXHIBITS TO BC- TRANSMITTED TO U.S.C.A.

COURT. Clerk  


**A**

2a

INDICTMENT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- -X  
UNITED STATES OF AMERICA,

-v-

ALFREDO AGRELO,  
GREGORIO CASTILLO and  
RAMON RIVERA a/k/a Tony a/k/a Barry,

Defendant s.

INDICTMENT

73 Cr. 141

----- -X  
The Grand Jury charges:

1. From on or about the 1st day of September, 1973 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York,

ALFREDO AGRELO  
GREGORIO CASTILLO and  
RAMON RIVERA a/k/a Tony, a/k/a Barry

the defendant<sub>s</sub> and others to the Grand Jury unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendant<sub>s</sub> unlawfully, wilfully and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

INDICTMENT

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about September 26, 1973 the defendant, RAMON RIVERA, a/k/a Tony, a/k/a Barry, the defendant ALFREDO AGRELO and the defendant GREGORIO CASTILLO met at 137th Street and Broadway, New York, New York and had a conversation.

2. On or about September 26, 1973 the defendant GREGORIO CASTILLO delivered a package to the defendant ALFREDO AGRELO.

(Title 21, United States Code, Section 846.)

SECOND COUNT

The Grand Jury further charges:

On or about the 26th day of September, 1973

in the Southern District of New York,

ALFREDO AGRELO,  
GREGORIO CASTILLO and  
RAMON RIVERA a/k/a Tony, a/k/a Barry

the defendant<sup>s</sup>, unlawfully, intentionally and knowingly did possess with intent to distribute, a Schedule II narcotic drug controlled substance, to wit, approximately one-eighth kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).) and Title 18, United States Code, Section 2.)

FOREMAN

PAUL J. CURRAN  
United States Attorney

## CROSS-EXAMINATION

BY MR. AIDALA:

Q Mr. Romeo, when you came to this country in 1971 was that the first time you had been in this country?

A Yes.

Q Did you come alone or with someone else?

A By myself.

Q How did you enter this country?

A Visa, visitor.

Q When did you first begin to deal in the sale of cocaine?

A Late February, this year.

Q Were you arrested only on one occasion?

A Yes.

MR. AIDALA: At this time I would ask the United States Attorney to produce whatever papers they have concerning the charges against this witness. We have not been provided with any of those.

MR. CAREY: Your Honor, the United States Attorney's office would be happy to supply those papers. We don't see the relevance to this particular case.

THE COURT: Well, you can talk about that over the lunch recess. It wasn't asked for earlier on discovery and I am not sure whether it is required on discovery but

2 you proceed with your cross and we will see about that.

3 Q Do you recall what day you were placed under arrest?

4 A Yes.

5 Q What day was that?

6 A April 5th.

7 Q This year?

8 A Yes.

9 Q Do you recall who placed you under arrest?

10 A My house.

11 Q Who placed you under arrest?

12 A Federal agent.

13 Q That occurred at the place where you were living  
14 at that time?

15 A Yes.

16 Q Are you still living at that same location?

17 A Yes.

18 Q Which agent or agents arrested you, do you recall?

19 A Yes.

20 Q What are the names, do you recall, of the agents  
21 who placed you under arrest this year?

22 A Gray, Kober, Grant, White, Smith, Nieves. I know  
23 another one but I don't remember the name.

24 Q Since you have been placed under arrest, you have  
25 become quite, shall we say, friendly with various agents,

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ards

Romeo - cross

94

is that not correct?

A Yes.

Q Would it be true to state that you have been in their company for many, many hours since you have been placed under arrest?

A Yes.

Q By the way, Mr. Romeo, before coming to testify in court today did you discuss this case with anyone?

A No.

Q Are you positive of that?

A Sure. I can swear it.

Q You can swear it?

MR. CAREY: Your Honor, the case has been discussed

MR. AIDALA: I object to this.

THE COURT: Don't do that again.

Q Is it not true, Mr. Romeo, that before testifying here in court today you discussed this case with an agent by the name of Gray?

A No.

Q Isn't it true that you discussed this case with some agent before testifying today?

A No.

Q Isn't it true that you discussed this case with some United States Attorney before testifying today?

A

7

1  
2 A No.

3 Q Isn't it true that you discussed this case with  
4 some United States Attorney before testifying today?

5 A No.

6 Q You are positive of that, is that correct?

7 A That is right.

8 Q By the way, when you were placed under arrest,  
9 were you living with anyone at that time?

10 A Yes.

11 Q Who were you living with?

12 A My wife.

13 Q The woman who is now your wife?

14 A Yes.

15 Q She was not your wife at the time?

16 A Right.

17 Q How long had you been living with her, approxi-  
18 mately?

19 A A year.

20 Q You had not gotten married up to that time?

21 THE COURT: Is that relevant?

22 Q Is it not true that thru the intervention of  
23 the Governmental agencies or agents you were permitted,  
24 after having been placed under arrest, to marry the woman  
25 you were living with for over a year or so?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ards

Romeo - cross

96

A No, sir.

Q I will repeat it. Before you had been placed under arrest did you and your present wife have any plans, any date set to have been married?

A Yes.

Q What date was it that you were to be married?

A We didn't have any, you know, date. But we were discussing it.

Q You were discussing it. Approximately a week after you were placed under arrest you had a license, the blood test and in fact were married to her, isn't that correct?

A That was before that. I got my blood test and my license.

Q But you got married approximately a week after being placed under arrest?

A Right.

Q Isn't it a fact that you were assisted in being able to get married by an agent?

A By an agent? I don't understand.

Q Let me take you back a step. When you were placed under arrest was any bail set?

A Yes.

Q How much bail was set in the case?

A \$500.

A

9

Q \$500.? That was for four sales of cocaine?

A Yes.

Q Was that \$500. bail set after you had agreed to do whatever the agents asked you to do?

A Yes.

Q Was it your understanding that that \$500. bail was set as a result of your having agreed to do whatever the agents had asked?

A Yes.

Q At that time had it been brought to your attention that you would be subject to being deported if found guilty of the charges against you?

A Yes.

Q Was it in any way suggested that if you married a United States citizen that you might have a good chance of remaining in this country?

A No, sir.

Q Well, was it your understanding at that time or up to the present time that by being married to a United States citizen you had a good chance to remain?

A I do understand. No matter who I married to, you cannot stay in this country if I have narcotics charges. I marry my wife to get her residence in my country, to try to get my residence in this country.

Q You wanted to stay in this country or go to Argentina?

A I like to stay if I can stay. If I can't I just go back, that is all.

Q Before you started to do whatever the agents asked you to do, did anyone or more than one of them tell you how much jail time you faced if convicted of the crimes for which you were charged?

A Yes.

Q How much time did they tell you?

A Ten years.

Q Eight years?

A Ten years.

Q Ten years. On each of the charges?

A I understand the whole thing.

Q Had you ever been in jail before this time?

A No.

Q After having been told that fact did you agree to do whatever they asked you to do?

A Yes.

THE COURT: Mr. Aidala, when you find a convenient point to stop, we will stop for lunch.

MR. AIDALA: We can stop now, Judge. I would like to do that.

1 THE COURT: Let us take lunch and let us come  
2 back, ladies and gentlemen, at 2:15.

3 [Jury left the courtroom]

4 THE COURT: Let me keep you just a second, gentle-  
5 men.

6 When we suspend with the jury, let us just hang  
7 around in case anybody has an application.

8 I don't have any but I just want to remind you that  
9 I expect counsel to attend to Mr. Aidala's request for what-  
10 ever it is that he wants to see about the charges pending  
11 against Mr. Romeo. Is there an indictment?

12 MR. CAREY: I understand there is, your Honor.

13 THE COURT: Is there anything else you want to  
14 see?

15 MR. AIDALA: Is the indictment pending at this  
16 time?

17 MR. CAREY: That is my understanding, your Honor.

18 MR. AIDALA: If it is available I would like to  
19 see it.

20 THE COURT: Do you have anything else in mind?

21 MR. AIDALA: Not at this time.

22 THE COURT: All right, please take care of it,  
23 gentlemen.

24 [A luncheon recess taken until 2:15 p.m.]

AFTERNOON SESSION2:15 p.m.

A N I B A L R O M E O, resumed:

MR. CAREY: The Government requests a side bar conference on the indictment which the defendant is under.

THE COURT: Ask him to hold the jury.

MR. CAREY: Can we exclude the witnesses?

THE COURT: Let the witnesses be excluded from the courtroom, please.

Why don't you wait outside, Mr. Romeo.

[Witness leaves the courtroom]

MR. CAREY: Your Honor, we have a copy of the indictment which the Government is prepared to give Mr. Aidala to satisfy his request.

However, we request that the Court limit the amount of questioning that can be made by Mr. Aidala on the basis of this indictment. Mr. Aidala has gone into the fact that the defendant is indicted and that he does have a motive, if it can be contrued as such by this jury, to lie. And to the extent to which this indictment goes into the charges against the defendant which he has pled not guilty to the indictment, one, would prejudice the Government's case and,

two, are unnecessary for the purpose for which the defense would use the fact that the witness is under indictment.

THE COURT: Would prejudice the Government's case where, under that indictment?

MR. CAREY: Not in this case, your Honor, but unnecessarily bringing in unrelated criminal matters.

THE COURT: Of course, one of Mr. Aidala's jobs is to try to prejudice your case so I never understand that as --

MR. CAREY: I understand that, your Honor, but the limits to which --

THE COURT: You haven't told me where the limit is. Nothing you said seems cogent from what you are talking about. The Government accused this man of various kinds of misbehavior and he is hoping by cooperating, which is not unfamiliar to us, to improve his situation and the defense, in order to test his motives, wants to bring out the extent of the accusations he faces. That is sort of standard procedure.

I don't know how well it works with the jury. It seems to me almost never to work but I don't know that I should stop anybody from undertaking it.

MR. CAREY: Your Honor, then I can't give you any other reasons other than those I have given.

A 13a

1  
2 THE COURT: Those aren't enough. Give the indict-  
3 ment to Mr. Aidala.

4 MR. CAREY: The Government requests that the  
5 defendant be given an opportunity to consult with his own  
6 lawyer -- The Legal Aid was appointed to him -- with respect  
7 to the testimony he would give in answer to Mr. Aidala's  
8 questions, that he might possibly give on the indictment,  
9 and that perhaps your Honor would excuse the witness subject  
10 to recall tomorrow morning to give the witness --

11 THE COURT: Do you mean this comes to you as a  
12 surprise? You didn't know this was going to be a subject  
13 of interrogation on cross-examination? You and Mr. Kenny  
14 didn't know that he might be cross-questioned about the  
15 circumstances of the charges pending against him? I don't  
16 really understand that.

17 MR. CAREY: Yes, your Honor, I fully expected him  
18 to be cross-examined. I attempted to get a copy of this.  
19 I did not realize what the indictment contained.

20 MR. KENNY: If I may, your Honor, it is in our  
21 experience not normal practice for an informant or a witness  
22 who is under indictment to be questioned about the facts of  
23 that indictment if he pleads guilty.

24 THE COURT: The practice is to ask whether he did  
25 the things he is accused of.

MR. AIDALA: At this point I haven't seen the indictment and I don't know what may be --

THE COURT: You are as much in the dark as I am. I will rule that you may ask him about what he is accused of but I am not going to let you ask whether he did those things.

MR. AIDALA: Of couse, Judge, it is the discretion of the Court, any prior bad acts that the witness has committed can be asked an gone into, which is within the discretion of the Court.

THE COURT: I know. Whether it is discretionary or whatever, I am now telling you I am not going to allow you to try that indictment. I think you have gone about as far as you need to go anyhow and this whole discussion may be moot and this whole discussion is now terminated and when I hear the questions I will rule on them. Let us proceed.

[Jury present]

A N I B A L R O M E O, resumed:

THE COURT: All right, Mr. Aidala.

CROSS-EXAMINATION [CONTINUED]

BY MR. AIDALA:

Q Mr. Romeo, from the time that you answered the last question until this point in time, have you spoken to

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ards

Romeo - cross

113

if you were asked that question?

A What the agents told me is to tell the truth.

Q Talking about your indictment, that is the indictment in which there are four counts, is that correct?

A Yes.

MR. AIDALA: I don't have a number on the indictment. Do you have it?

MR. CAREY: No, I don't.

Q Mr. Romeo, are you aware of the fact that if convicted of all the charges in this indictment against you, that you are subject to a very substantial jail term?

A I don't understand.

Q Are you aware of the fact that if you are convicted of all the charges in this indictment, that you are subject to going away to jail for many, many years?

A I know.

Q Did the agents make that clear to you?

A Not the agents, the Magistrate.

Q Have you spoken to any United States Attorney concerning your indictment in the case against you?

A Yes.

Q Which United State Attorney have you discussed your case with?

A Mr. Lavin.

1           Q     Did you discuss with Mr. Lavin the fact that you  
2           were working with agents?

3           A     I didn't discuss with him, just went to his office  
4           with the agents.

5           Q     Did the agents in your presence tell him what you  
6           were doing out on the street?

7           A     Not in my presence.

8           Q     During the time that you were with the agents --

9           A     Before that, the next day, I was arrested I spoke  
10          to Mr. Sabatta on my case. He told me I wouldn't be released  
11          anyways.

12          Q     How much money does your wife earn, Mr. Romeo?

13          A     About \$320.

14          Q     A week?

15          A     No, a month.

16          Q     How much rent do you pay where you live?

17          A     \$200.

18          Q     Is the sole source of your income the money that  
19          your wife makes and the money that you receive from the  
20          agents?

21          A     And my mother used to send.

22          Q     Talking about the last two months or so?

23          A     Yes.

24          Q     Do you buy your clothing with the money that the  
25

1 ards

Romeo - cross/ redirect

124

2 him?

3 A It is not my fault.

4 MR. CAREY: Objection, I don't see the relevance  
5 of this witness's testimony. He said he hadn't seen the  
6 man before.

7 THE COURT: I don't think it is relevant either.  
8 It is answered. Proceed.

9 MR. AIDALA: At this time I offer into evidence  
10 the indictment against this defendant.

11 MR. CAREY: Objection, your Honor.

12 THE COURT: Sustained.

13 MR. AIDALA: Exception.

14 At this time I have no further cross-examination  
15 of this witness.

16 MR. HERWITZ: I would join in this offer, your  
17 Honor, the offer of the indictment.

18 THE COURT: All right.

19 REDIRECT EXAMINATION

20 BY MR. CAREY:

21 Q Mr. Romeo, when you first were asked by Mr. Gray  
22 to work as an informant, what were the conditions under  
23 which he asked you to work for him?

24 A First thing he told me, don't do illegal things.

25 Q Did he tell you anything else?

A 18

1  
2 MR. GARRIGAN: Your Honor, may I have thirty  
3 seconds? May I just talk for thirty seconds?

4 THE COURT: Yes. Mr. Aidala, I am going to want  
5 your views as to what to tell the jury if these other two  
6 defendants are permitted to plead guilty. My hunch is that  
7 I must tell the jury that they have pled guilty but that  
8 their pleas in themselves cannot be taken as any indication  
9 of guilt or innocence as to Mr. Rivera. But I will take  
10 your views on that question.

11 MR. AIDALA: I must say at the moment I don't know  
12 which is the lesser of two evils, making that comment to  
13 the jury and I don't know what they might infer or assume.  
14 I am simply thinking out loud. I really don't know and I  
15 have not had that experience before, Judge.

16 I have never been in a situation where the other  
17 defendants or codefendants pleaded guilty and the case  
18 continued. I cannot draw on any past experience as to how  
19 it has been handled in other matters.

20 THE COURT: Well, joining you in thinking out loud,  
21 I believe that first we ought not have the jury speculate  
22 because we don't know what this will cause but, secondly,  
23 since it is a conspiracy which is the subject of count 1,  
24 it requires the participation of more people than one, it  
25 seems to me it would not be fair to have them here from day

one and have them mysteriously simply disappear on day two. I think Mr. Rivera is entitled to have an instruction, as I say, that his guilt or innocence is wholly separate and is not affected by their pleas of guilty, but the Government is entitled to have the benefit of its proof there was a conspiracy, leaving the question whether he was in it or not.

MR. AIDALA: The only problem I see, Judge, is that in some way the jury might use the admissions of guilt on the part of these two defendants as evidence establishing the conspiracy.

THE COURT: Well, it is conceivable they might. I am going to instruct them they cannot consider the evidence of these pleas against Mr. Rivera but I don't know how else as a practical matter to handle that.

What is the Government's position?

MR. CAREY: Your Honor, the Government's position is that we agree with your Honor that the jury be instructed that they could not draw any inference from the defendants' pleas of guilty.

THE COURT: I think that is what in fairness I ought to tell them. I am not wholly unaware of the practical problems but I think there is a problem of simple fairness and candor with the jury and avoiding the kind of unfettered speculation, the result of which nobody can know but it

1 ards.

2 can't be useful really in an effort to do justice.

3 MR. AIDALA: If your Honor does take the course  
4 that he has indicated, I would strenuously urge upon the  
5 Court that you specifically direct the jury's attention to  
6 the fact that they are not to use the pleas of guilty of  
7 these two codefendants as any evidence establishing that  
8 in fact a conspiracy existed between the two codefendants  
9 and the defendant Rivera.

10 THE COURT: I will so instruct them, yes.

11  
12  
13  
14  
15 [Continued on next page]  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1  
2 MR. AIDALA: Judge, the defendant keeps imploring  
3 me to ask the Court to entertain his motion to reduce bail.  
4 He keep repeatedly imploring me to bring this to the Court's  
5 attention so I am doing it.

6 THE COURT: Are there any grounds that have not  
7 been considered that would warrant such extraordinary relief  
8 at this time?

9 MR. AIDALA: The only thing I can say is that the  
10 defendant has been unable to make the bail set originally.  
11 He has been incarcerated since that time. He is on welfare,  
12 he has no funds to speak of and the bail appears to be high  
13 for a person of this defendant's status.

14 THE COURT: No, I think in the circumstances as  
15 they now appear where the case against him is surely more  
16 powerful than it was at the time when bail was heretofore  
17 set, this cannot be a time for the reduction of bail and  
18 the application is again denied.

19 MR. AIDALA: He is asking that the Court set a  
20 percentage in the alternative.

21 THE COURT: No, the bail conditions will remain  
22 as they are and we will now proceed with the trial.

23 [Jury present]

24 THE COURT: Now, ladies and gentlemen, it is 11:30  
25 and you have been here since 9:30. You are entitled to an

1 ards

2 explanation and I will give it to you.

3 First, I see that the alternate has taken seat  
4 No.5. I gather you have been informed that Mr. Lust has some  
5 illness and is unable to be with us so Mr. Magio is now  
6 Juror No.5.

7 Secondly, in defense of the people who work here  
8 for a living I will tell you that in order to deal with a  
9 number of matters that had to be handled, counsel were here  
10 and even I was here at 8:30 this morning to work on them.  
11 Unexpected concerns arose and everybody has been earnestly  
12 at work since then and the things that were necessary to  
13 do have just been completed.

14 Among the things that happened this morning were  
15 the decisions by Mr. Castillo and Mr. Agrelo to withdraw  
16 their pleas of not guilty and enter pleas of guilty to the  
17 charges against them, so you observe that they are no longer  
18 present at the defense table.

19 It becomes vitally important to remind you of some-  
20 thing that I hope you all know anyhow, that in our system  
21 of justice guilt or innocence is a strictly personal and  
22 individual matter.

23 That means specifically in the context of this  
24 case that the entry of a plea of guilty by any person as  
25 respects himself is no evidence whatever as to the guilt

or innocence of any other individual, and that is important.

More specifically, the fact that Messrs. Castillo and Agrelo, for their own interests as they understood them, and on the facts relating to them as they understood them pleaded guilty, has no bearing whatsoever on the defendant Mr. Rivera. It is no evidence whatever that either of them was in a conspiracy with him or he was in any conspiracy whatever. His plea of not guilty stands, the presumption of innocence remains in his favor, and the questions that will confront are the separate and individual questions as to him after the record of evidence in this case has been completed.

We all count on you to pay strict and faithful attention to those principles.

I think we are ready to proceed.

MR. CAREY: The Government calls Robert Nieves.

ROBERT J. NIEVES, called as a witness  
by the Government, being first duly sworn, testified  
as follows:

DIRECT EXAMINATION

BY MR. CAREY:

Q By whom are you employed, Mr. Nieves?

A By the United States Department of Justice, Drug  
Enforcement Administration.

1  
2 pursuant to the telephone call, he and his friend had agreed  
3 to go to 137th Street and Broadway.

4 He then told me that later on after the telephone call  
5 his friend came down, picked him up and they proceeded by  
6 cab down to 137th Street and Broadway.

7 Q Did he say what happened after that?

8 A Yes. He said that he had been in that area for  
9 sometime. I asked whether he ever entered a bar in that  
10 area, 137th Street and Broadway and he said no, he was never  
11 in a bar.

12 I asked him had he had any conversations with any other  
13 people and I asked him particularly in reference to the  
14 other people who had also been arrested and his response was  
15 at that time that he had said hello to other people that had  
16 been arrested but had not had any conversation with them.

17 Q Did he mention how many people he had said hello  
18 to?

19 A He mentioned, the way I wrote it down was three  
20 other guys.

21 Q Did he say what he was doing at the time that he  
22 was arrested?

23 A Yes. He said that he had been waiting for a bus,  
24 at a bus stop near 137th Street and Broadway.

25 Q Did you make any inquiries about his possible

previous criminal record?

A I did.

Q Did you ask him whether or not he had any convictions?

MR. AIDALA: Objection, your Honor.

THE COURT: Sustained.

MR. AIDALA: I move for a mistrial at this time.

THE COURT: That is denied. We are not interested in that subject at all. There is no information before the jury about that.

Go ahead.

MR. CAREY: I have no further questions, your Honor.

CROSS-EXAMINATION

BY MR. AIDALA:

Q Mr. Figueroa, did you speak to all of the individuals who were arrested that night?

A I probably did, yes.

Q Do you know in what order you spoke to them?

A No, I am not at all sure what order I spoke to them.

Q You mentioned giving certain advice to Mr. Rivera before asking him any questions?

A Yes, sir.

Q Did you read from the form and are those the

USA vs 1  
 Agnello et al 2  
 12/3/73 2  
 73 Cr. 941 3

ar 1

CHARGE OF THE COURT

THE COURT: (Frankel, J.) Ladies and gentlemen of the jury, we come to the last critical, final stage of this proceeding, the time when the case will be given to you for you to take over as judges of the facts. It is a time when it is appropriate, if not a great length, to remind you of the objectives we spoke about when you were selected last week, objectives that respond to your fundamental character and responsibilities as judges.

Your oath, the traditional oath of jurors, calls upon you to decide without fear and without favor, bias or prejudice, to be absolutely impartial and that means that you will be entirely detached and entirely objective. It is not for you, nor for us when we function as judges, to identify in any way or in any respect, with either side. You are not to think of yourselves as identified with the prosecution nor as identified with the defense, or to think of this case as if it were a case involving you on either side, because it does not.

It involves you as neutrals, as judges of the facts, impartial seekers of the truth.

My function here, and throughout in a trial, is simply to administer the rules of law that govern a trial, to make decisions about the procedural issues that come up

1 ar 2

2 during the trial and now to tell you the rules of law that  
3 will govern the charges in this case and your deliberations.

4 I hardly need remind you adult citizens that this is  
5 a serious business. It is not a game. So the rulings that I  
6 have made , and they have been infrequent in this trial, are  
7 not of any consequence to you any more. It is not a question  
8 here of who made or won or lost the most points or most ob-  
9 jections. It is not a case of choosing between lawyers; both  
10 have done their duty in their respective assignments.

11 It is now a case of seeking the truth. You are to  
12 seek the truth from the evidence. I remind you again that  
13 the evidence is what you heard from the witness stand, and the  
14 exhibits, and one or two matters that have been stipulated  
15 that you may treat as facts for your purposes.

16 The indictment, which I will be reading to you in  
17 a little while, is not evidence. It is an accusation or a set  
18 of accusations.

19 The things that counsel have said, and the things  
20 that I have said and I am saying, none of those are evidence.

21 This defendant, in response to the indictment against  
22 him, has pled not guilty. That has placed upon the government  
23 the burden of proving him guilty beyond a reasonable doubt  
24 before he may be convicted of either charge against him.

25 That is a burden, as you have heard, that never

ar 3

shifts. Whether it has been discharged is not a question you answer by hefting the evidence or counting it, but by together carefully appraising the evidence, its over-all cogency, its final impact on your collective judgment in reconstructing the events out of which this criminal proceeding grew.

I mentioned to you a little while ago and I repeat that as a corollary of the government's burden of proof it is also the law that a defendant in a criminal case, is not called upon to prove his innocence. A defendant is not required to prove anything in a criminal case. This defendant, all defendants, are presumed to be innocent.

That presumption, about which all of you heard before this trial and about which you heard in this trial, stays with the defendant throughout and remains with him until and unless the jury is unanimously convinced of his guilt beyond a reasonable doubt.

Now, the same rule that says a defendant is not required to present any evidence, leaves with him the absolute and unqualified right to decide with the advice of counsel, whether or not he will himself take the witness stand. He may choose not to, he may rely in his defense on testimony or evidence developed in cross-examination.

If, as in this case, a defendant does not take the

1 ar 4

2 stand, his exercise of that right must not be the basis of any  
3 inference of any kind against him. Briefly, let me instruct  
4 you that that fact should not play any part in your delibera-  
5 tions.

6 I have talked about the familiar concept of proof  
7 beyond a reasonable doubt. I want to say, as we always say  
8 in instructions to juries in a criminal case, what those words  
9 mean in this setting.

10 They mean, first of all, what they literally under-  
11 take to convey; they mean a doubt that is founded on reason,  
12 applied to the evidence or the lack of evidence in the case  
13 before you.

14 A reasonable doubt is one that has substance and is  
15 not merely shadowy. It is a doubt that arises from your judg-  
16 ment and your common sense and your collective experience  
17 applied to the record of evidence in the case before you.

18 It is not an excuse to avoid the performance of an  
19 unpleasant duty. It is not a guise or pretext for extending  
20 sympathy to a defendant.

21 A reasonable doubt is the kind of doubt that would  
22 cause a prudent person to hesitate before taking action in some  
23 matter of importance to himself or herself. Saying that same  
24 thing in more words, if you had or have a serious decision to  
25 make, and you proceed coolly and objectively to review the

1 ar 5

2 factors that have a bearing on that decision, and if at the  
3 end of that process you find yourself beset by uncertainty  
4 and unsure of your judgment, you have what we try to describe  
5 here as a reasonable doubt.

6 The converse of that is also true. If you have such  
7 a serious decision to make and if you proceed as I have said  
8 to make a detached and objective review of the relevant  
9 factors, and if at the end of that you do not have the kind  
10 of uncertainty and kind of reservation about your judgment  
11 that I have described, then you do not have a reasonable doubt.

12 Proof beyond a reasonable doubt does not mean  
13 proof to a positive certainty or proof beyond any conceivable  
14 doubt whatsoever. If that were the rule, nobody could ever  
15 be convicted in any criminal case where there was any issue  
16 about the facts. It is in the nature of issues of fact, and  
17 perhaps especially of issues of what happened in the past,  
18 that they are not capable of resolution or decision to an  
19 absolute mathematical certainty. So that kind of certainty  
20 is not what is required under the burden of proof beyond a  
21 reasonable doubt.

22 AT the same time, I trust you will realize as I  
23 come to the end of this portion of our instructions, that in  
24 a criminal case in our system, the prosecution's burden of  
25 proof is a very high one and that you may convict only if your

1 ar 6

2 minds are free of reservations and uncertainties like those  
3 I have talked about here.

4 Let me proceed toward the description of the specific  
5 accusations in this case and the specific problems they pre-  
6 sent for your decision.

7 Let me first describe the indictment, including a  
8 reading of those two counts placed before you. You know now  
9 that there is a charge of conspiracy here, the first count of  
10 the indictment, and then a second count which charges an  
11 actual transaction in violation of the narcotic laws, and that  
12 is what you may have heard referred to by counsel and what I  
13 will refer to from time to time as the substantive count.

14 The gist of the crime of conspiracy in our law,  
15 and I will spell this out further in a few minutes, is the  
16 unlawful agreement or combination by two or more people to  
17 act together to accomplish some illegal thing.

18 As I say, that is the gist of the crime, the agree-  
19 ment, and it is that important sense for our purposes that we  
20 distinguish conspiracy from substantive offenses.

21 I will want to illustrate that and I think it will  
22 be perfectly simple by reference to a kind of situation that  
23 is not at all involved in our case.

24 You could have a conspiracy, an agreement or a  
25 combination among two or more people to commit a murder, and

1  
2 if they then took one or more steps toward carrying out that  
3 murder, the crime of conspiracy would be complete, even  
4 though they never accomplished the killing which was the  
5 objective. In that sense the agreement, the conspiracy, is  
6 distinguished from the substantive offense, which would be  
7 the murder actually committed, to complete it.

8 That schematically, at least, illustrates the  
9 situation here, where we have a charge of illegal conspiracy,  
10 and as a separate crime, in this indictment.

11 These charges of criminal conduct, like all  
12 charges in the federal system, and substantially all our  
13 states, rest upon or are based upon federal statutes, laws  
14 enacted by Congress.

15 Here we deal with a specific law, the terms of  
16 which are not important and the section numbers of which are  
17 not important, although I will have occasion to read some  
18 sections. We have a law which appears in Title 21, United  
19 States Code, and which makes it a crime to distribute or to  
20 possess with intent to distribute, certain kinds of narcotic  
21 drug controlled substances, among which is included cocaine.

22 It is a crime to distribute, or to possess with  
23 intent to distribute. It is also a crime to conspire to  
24 violate that prohibition. So we have here a charge of  
25

1 ar 8

2 conspiracy to distribute or to possess with intent to dis-  
3 tribute, and then a charge of actual possession with intent  
4 to distribute; as I say, the conspiracy count and the sub-  
5 stantive count.

6 Although they are alleged in the indictment in that  
7 order, which is rather customary, it is somewhat simpler for  
8 your understanding and somewhat economical as far as the  
9 repetition goes, if in these instructions I deal first with  
10 the substantive offense, which is count two, and then come  
11 back and instruct you on the first count, the charge of  
12 conspiracy. So we will go in that order as I proceed to tell  
13 you the rules applicable to these accusations.

14 Before I do that, and before I read to you the  
15 words of the indictment, let me remind you of another thing  
16 that you have heard about before. I remind you in this in-  
17 dictment as it was issued by the grand jury, three defendants  
18 were originally named.

19 I remind you in that connection of the important  
20 principle that in our system guilt or innocence is strictly  
21 an individual matter. Whatever may have transpired in this  
22 case with respect to the defendants Agrelo and Castillo, you  
23 have now before you the exclusive, the separate and the  
24 individual question of the guilt or innocence of the one  
25 defendant with whom you are concerned, Ramon Rivera.

1 ar 9

2 With that, let me turn to the indictment and, as I said, we  
3 will start with the second count, which is brief. It reads  
4 this way:

5 "The grand jury charges on or about the 26th day of  
6 September, 1973, in the Southern District of New York" --  
7 which I interrupt to say includes this county of Manhattan,  
8 the Bronx and Westchester and some other counties from which  
9 some of you come I think -- "on or about the 26th day of  
10 September, 1973, in the Southern District of New York, Alfredo  
11 Agrelo, Gregorio Castillo and Ramon Rivera, also known as  
12 Tony or also known as Barry, the defendants, unlawfully, in-  
13 tentiously and knowingly did possess with intent to distri-  
14 bute, a Schedule II narcotic drug controlled substance, to  
15 wit, approximately one eighth kilogram of cocaine."

16 Before you could find the defendant guilty of that  
17 offense charged in count two, you would have to be satisfied  
18 beyond a reasonable doubt on each and every one of these three  
19 essential elements. When I say each and every one, you will  
20 all understand what that means. It is simple but important  
21 English; it means that if the government fails to prove any  
22 one of these three, you must acquit the defendant. Those  
23 three essential elements are as follows:

24 First, that the substance that the government claims  
25 was possessed with unlawful intent to distribute was in fact

1 ar 10  
2 cocaine.

3 Second, that on or about the date alleged, the  
4 defendant possessed that substance with intent to distribute  
5 it.

6 Third, that the defendant acted intentionally and  
7 knowingly.

8 Each of those three essential elements call for some  
9 brief elaboration and I turn to that.

10 As to the first, the requirement of proof that the  
11 substance in question was cocaine, I very briefly remind you  
12 there is a stipulation in this case that the United States  
13 chemist, if called to the stand, would testify that the white  
14 powder contained in government exhibit one, is in fact cocaine.

15 As to the second essential element, the required  
16 proof of possession with intent to distribute, there are a  
17 couple of brief, necessary matters of definition. Distribute  
18 in this statute refers very simply to sale or delivery or  
19 transfer.

20 As to the notion of possession with intent to dis-  
21 tribute, it takes a few additional words to cover that.  
22 Basically, to start out with, the word "possession" in this  
23 statute has its everyday meaning. It means simply the having  
24 of something within one's possession, physical grasp or c on-  
25 trol. Going further, however, possession here and generally

1 ar 11

2 in the law may be of two types.

3 It may be actual and physical or it may be what in  
4 the law we call constructive. Actual possession means, as I  
5 say, the personal or manual or other physical control of an  
6 object.

7 Constructive possession exists if the thing, in this  
8 case drugs, are in the physical possession of some other person,  
9 but the defendant with whom you are concerned, has the power  
10 to exercise control over them, or over their distribution, or  
11 to direct their movement, or to cause their delivery.

12 In other words, in this sense, which is as you know,  
13 the sense on which the government relies in the particular  
14 circumstances of this case, to possess something you don't  
15 have to have it in your hand or in your pocket or within your  
16 immediate and direct grasp. If it is within your power to  
17 exercise control in the sense of ordering or directing delivery,  
18 then you may be found to have constructive possession of the  
19 thing or things in question.

20 In connection with this substantive charge of  
21 possession of cocaine with intent to distribute, the govern-  
22 ment also relies on another statute that I make very brief  
23 reference to here, the statute that defines a concept that is  
24 fairly old in criminal law, the concept of aiding and abetting.

25 Under this concept, if the essential elements of the

1 ar 12  
2 crime are otherwise established, it is not necessary for the  
3 prosecution to show that a defendant himself physically  
4 committed the crime in question. The law provides that a  
5 person who aids or abets another to commit an offense is as  
6 guilty of the offense as if he had committed it himself.  
7 The government invokes that rule here.

8 It contends that the defendant Rivera should or  
9 may be found guilty as an aider and abetter of the two who  
10 were formerly here as his co-defendants, Agrelo and Castillo.

11 So in judging that contention and whether it has  
12 been established, you want to have in mind what we mean by this  
13 notion of aiding and abetting. On that again, a few words  
14 are justified.

15 To begin with, to find someone guilty of aiding and  
16 abetting, you would know, of course, that you must find some-  
17 thing more than mere knowledge on his part, that a crime was  
18 being committed. A mere spectator to the commission of a  
19 crime is not an aider and abetter.

20 On the other hand, under this concept as I have al-  
21 ready indicated, it is not necessary for a finding of guilt,  
22 to find that the defendant himself did any of the acts that  
23 constitute the offense.

24 So, to determine in any case and to determine in  
25 this case whether there has been proof that the defendant

1 ar 13

2 functioned as an aider and abetter, you ask yourselves these  
3 questions: did the defendant you are considering associate  
4 himself with the criminal venture? Did he participate in it  
5 as something that he wished to further and complete? Did he  
6 seek by his own actions to make the criminal venture or what-  
7 ever it was, succeed?

8 If he did, and if you so find beyond a reasonable  
9 doubt, you may conclude that he is guilty as an aider and  
10 abetter.

11 Finally, let me come back to the third element and  
12 last essential element of this offense. I remind you that the  
13 defendant is charged in this indictment, and this comprises  
14 the third essential element, with having acted intentionally  
15 and knowingly in doing the things that are said to constitute  
16 the crime.

17 Those words in the statute and in the indictment,  
18 intentionally and knowingly, identify the factor of criminal  
19 intent without which there could not be a conviction in a  
20 case like this or in most criminal cases.

21 So the words are critical here as they are in most  
22 criminal cases, but there is no mystery or specific complexity  
23 in defining the words. In order to be shown to have acted  
24 intentionally and knowingly, a defendant must be shown to have  
25 acted deliberately and purposely, not as a result of mistake

1 ar 14

2 or accident, or from some other innocent or unknowing cause.

3 The defendant need not be shown to have known that  
4 he was violating some particular law and need not be shown  
5 to have known the terms of any particular law involved in the  
6 case. But he must be shown to have acted with a bad or evil  
7 purpose, in the sense that he specifically knew that he was  
8 engaging in narcotics dealings forbidden by the criminal law.

9 Knowledge and intent need not be and they commonly  
10 cannot be proved by so-called objective evidence. This is  
11 a subject, as you can see, that relates to the state of  
12 somebody's mind and commonly we don't have direct evidence  
13 of the state of somebody's mind.

14 So, in this courthouse as outside the courthouse,  
15 when we are making judgments about what is the state of some-  
16 one's mind, we are accustomed to rely on so-called circum-  
17 stantial evidence. Here you will consider all the circum-  
18 stances as you find them to have existed from the evidence  
19 in determining the state of mind with which the defendant  
20 Rivera did or did not act on the occasions in question.

21 You may consider among all the other things the  
22 extent, if any, to which the evidence shows that he acted  
23 stealthily or openly; the extent to which he may have taken  
24 measures to conceal what he was doing; or the extent to which  
25 he appeared to have been indifferent to who may have observed

his conduct at those times about which you have heard. I won't go on laboring that, I simply remind you that in determining whether this essential element of intentional and knowing conduct has been established, you will appraise all the facts, all the circumstances, and infer from what the evidence teaches you about the state of the defendant's mind.

With that, I come back to the first count of the indictment, the charge of conspiracy. Again, it is fairly brief and for whatever illumination it gives you, I will read it to you. If you should find in the juryroom that you need a copy of it, as I will remind you later, you can send out for for this, as with other things, and it will be supplied to you.

But let me read you the conspiracy count, and I will read it in two installments. I will read the first page of it and then stop before the second heading, "overt acts", and in a little while I will read you that when it fits in with the necessary instructions, and the reason for doing this I think will be perfectly evident as we go along. The first count says this:

"The grand jury charges:

"One. From on or about the first day of September, 1973 and continuously thereafter up to and including the date of the filing of this indictment in the Southern District

1 ar 16

2 of New York, Alfredo Agrelo, Gregorio Castillo and Ramon  
3 Rivera, also known as Tony, also known as Barry, the defend-  
4 ants, and others to the grand jury unknown, unlawfully, wilfully  
5 and knowingly combined, conspired and confederated and agreed  
6 together and with each other, to violate Section 812 and other  
7 sections of Title 21, United States Code.

8 "Two. It was part of said conspiracy that the said  
9 defendants unlawfully, wilfully and knowingly would distribute  
10 and possess with intent to distribute, Schedule I and II  
11 narcotic drug controlled substances, the exact amount thereof  
12 being to the grand jury unknown, in violation of those same  
13 sections of Title 21.

14 I have stopped and I will come back and read the  
15 rest in just a little while.

16 Again, at this point, I instruct you that before there  
17 can be a conviction, the government must once more prove be-  
18 yond a reasonable doubt, each and every one of three essen-  
19 tial elements, and those are as follows:

20 First, that at some time between September 1 and  
21 October 4, 1973, there was a conspiracy of the kind the govern-  
22 ment alleges, namely, a conspiracy to distribute or possess  
23 with intent to distribute, a narcotic drug controlled sub-  
24 stance, which includes concaine.

25 Second, that the defendant here on trial knowingly

1 ar 17

2 and wilfully participated in that conspiracy.

3 Third, that some one of the conspirators, whether  
4 this defendant or any other, committed at least one of the  
5 overt acts charged in the indictment, for the purpose of  
6 furthering the conspiracy.

7 Again, following the standard practice, I go back  
8 and elaborate briefly, in some instances, and in some in-  
9 stances not so briefly on those three essential elements.

10 As to the first, the government must prove the  
11 existence of the conspiracy it charges, and so you must have  
12 in mind perhaps in a little more detail than I have given  
13 you, the meaning of the concept of conspiracy in our law.

14 I think I told you that a conspiracy in a case of  
15 this kind is defined as a combination or an agreement of two  
16 or more persons by acting together in concert, to accomplish  
17 some criminal or unlawful purpose.

18 I have said that the unlawful combination or agree-  
19 ment is the crux or the gist of this crime of conspiracy.  
20 It is often said in legal settings that a conspiracy is a kind  
21 of partnership in crime, in which each member becomes the  
22 agent of every other member.

23 Although we use familiar legal and business-like  
24 words, "partnership", "agency", "agreement", you will find  
25 from your everyday experience that we don't use those words

1  
2 in their ordinary lawful sense. Common sense will tell you  
3 that if and when people get together to form a criminal con-  
4 spiracy, the formalities of a lawful agreement or partnership  
5 are not the heart of the matter. Much is left to informal  
6 and tacit understanding.

7 Since the agreement to accomplish some unlawful  
8 objective is the essence of the crime of conspiracy, a con-  
9 spiracy may be found to have existed, as I told you before,  
10 even if the objectives or purposes are not actually carried  
11 out. In other words, to show the existence of a conspiracy  
12 it is not necessary to show that the conspirators succeeded  
13 in bringing about their goals.

14 At the same time, evidence that the purpose was  
15 carried out or nearly carried out, may be considered by a  
16 jury or other trier of the facts as some evidence that there  
17 was in fact a conspiracy in existence.

18 The task of triers of the facts in a conspiracy  
19 case, your task in this case, is to take all the evidence  
20 together, to view it as a whole, and upon that kind of view  
21 and review of the evidence, reach your judgment whether there  
22 has been proof beyond a reasonable doubt that some two or  
23 more of the alleged conspirators, including the defendant  
24 before you, agreed expressly or tacitly to seek the unlawful  
25 object or objects alleged in count one of this indictment.

1 ar 19

2 If you are convinced of that, if you are convinced  
3 that the kind of conspiracy charged came into existence  
4 and lasted for some period of time, the exact period of its  
5 existence is not in itself a critical matter. To be more  
6 specific, you remember from my reading it just now that the  
7 allegation upon this subject in the indictment is there was a  
8 conspiracy in existence from on or about September 1, 1973,  
9 up to and including the day the indictment was filed, which  
10 was October 4, 1973.

11 I am simply instructing you at this point that the  
12 government in such a case is not required to prove that the  
13 conspiracy lasted or endured or existed throughout the period  
14 of time alleged in such a portion of the conspiracy indict-  
15 ment.

16 It is sufficient on this subject of duration if you  
17 find there was a conspiracy of the kind alleged and if you  
18 find that it was in existence for at least one or more days  
19 during the whole of the period described in the indictment.

20 If you don't find beyond a reasonable doubt that  
21 there was such a conspiracy, your work with respect to count  
22 one is ended, and it will be your duty to bring in a verdict  
23 of not guilty.

24 On the other hand, if you do find there was such  
25 a conspiracy, you reach what I listed for you as the second

ar 20

2 essential element, you reach the question whether the de-  
3 fendant here on trial has been proved to be a member, a  
4 participant, in a conspiracy. On that, remember that you  
5 are considering a question as to him as an individual. The  
6 separate question is guilt or innocence or his membership or  
7 non-membership in this conspiracy.

8  
9 The participation or membership of someone in a  
10 conspiracy must be established by evidence as to his own  
11 words, his own actions, and his own conduct, taken together  
12 with the actions and conduct of other people with whom he is  
13 found by you to have had relationships or connections that  
14 are meaningful to you on this subject.

15 But remember that the one defendant in this case  
16 has pleaded not guilty. He denies, to focus on the subject  
17 now at hand, membership in the alleged conspiracy  
18 Whether or not his membership has been proved beyond a reason-  
19 able doubt, I repeat to you for the last time, but I repeat  
20 it because of its importance, is not affected by the status  
21 of anybody else, specifically, the question whether anybody  
22 else pleaded not guilty to this accusation.

23 As I have said, in deciding the issue of Rivera's  
24 alleged membership, you will consider what you have heard and  
25 what you have believed about the things he said and did at  
the times in question, and you will consider those things in

1 ar 21

2 connection with the actions and statements of other people,  
3 to the extent that the connections with other people are sus-  
4 tained to your satisfaction by the evidence.

5 With this set of principles in view, I simply  
6 instruct you that you should consider, you may consider the  
7 evidence as a whole finally in determining whether MR. Rivera  
8 has been shown to have been a member of the conspiracy charged  
9 in this case.

10 To find that anybody was a member of a conspiracy,  
11 you must find that he knew the unlawful purposes of the con-  
12 spiracy, and knowingly associated himself with it. The  
13 government must have established beyond a reasonable doubt that  
14 Rivera entered into the conspiracy, aware of its basic nature  
15 and purpose, and with a specific criminal intent, that is,  
16 with the intent to participate in this combination in violation  
17 of the laws against possession of controlled narcotics, with  
18 the intent to distribute them.

19 A mere association with one or more people who are  
20 in a conspiracy, is not enough to make a person himself a  
21 member of that conspiracy. Mere presence with people who are  
22 conspiring, does not make one a member. Knowledge without  
23 participation is not enough. What must be shown is that the  
24 defendant associated himself, however informally, with the  
25 scheme or plan of the conspiracy, knowing the purpose or

1 ar 22

2 objects and intended to act in some way so as to bring about  
3 the success or completion of the venture.

4 If a person does participate in a conspiracy in  
5 that way, with knowledge of its purposes, and with the in-  
6 tention to help further them, he may be a member even though  
7 he participates in only some aspects or portions of the con-  
8 spiracy.

9 Conspiracies, like other enterprises, may have  
10 people in them who have varying and different roles, having  
11 larger and smaller roles, different assignments or responsibil-  
12 ites. A person may be a member of a conspiracy even though  
13 he doesn't know all the other participants and even if he  
14 never actually meets some of them.

15 The question, to repeat it, is whether the person  
16 before you, here Mr. Rivera, voluntarily joined in, however  
17 informally a way, in the conspiratorial venture, knowing what  
18 it was about, and meaning to participate in its fulfillment  
19 or in the completion of the enterprise.

20 The defendant is accused in the indictment of having  
21 joined the conspiracy knowingly and wilfully. Those words  
22 once again, under count one, refer to the element of criminal  
23 intent. I instructed you in talking about the substantive  
24 count as to the meaning of the notion of criminal intent in  
25 this setting. The same principles apply here.

1 ar 23

2 You may not convict the defendant on the conspiracy  
3 count unless you find that he became a member of it in the  
4 sense I have defined it for you, deliberately and purposely,  
5 with the kind of specific intent embraced by the words under  
6 this count, the words "knowingly" and "wilfully".

7 I return now to the third of the three essential  
8 elements of the conspiracy count, the requirement of proof  
9 of at least one of the overt acts committed by at least one  
10 conspirator during the conspiracy and with the objective of  
11 furthering it.

12 An overt act in this setting is not required to be  
13 some act criminal in and of itself, apart from the conspiracy.  
14 But it must, as I say, be some action taken by at least one  
15 conspirator, with the intention and purpose of carrying out  
16 the conspiratorial scheme or plan.

17 Let me take just a minute to mention the theory or  
18 principle of that requirement. It has been thought in our  
19 law that people might talk about and even agree about the  
20 achievement of some illegal purpose. They might leave it at  
21 ~~that~~ and never do any single thing to put it into operation,  
22 to put the unlawful enterprise about which they have talked  
23 into operation.

24 It is the theory of our law of conspiracy generally  
25 that if it never reaches beyond that discussion stage, the

1 ar 24

2 activity ought not to be made criminal. And so to implement  
3 that theory, to enforce this principle, we normally require  
4 that a crime of conspiracy may not be established unless at  
5 least one overt act is proved beyond a reasonable doubt.

6 In this indictment, in conformity with that require-  
7 ment, it is alleged that there were two overt acts. You  
8 remember a while ago I stopped before reading that portion  
9 of the indictment. I pick up and read that to you now.  
10 Under the heading of "overt acts", the indictment says:

11 "1. In pursuance of the said conspiracy and to  
12 effect the objects there of, the following overt acts were  
13 committed in the Southern District of New York:

14 "1. On or about September 26, 1973, the defend~~ant~~  
15 Ramon Rivera, also known as Tony, also known as Barry, Alfredo  
16 Agrelo and Gregorio Castillo, met at 137th Street and Broad-  
17 way, New York, New York, and has a conversation.

18 "2. On or about September 26, 1973, the defendant  
19 Gregorio Castillo delivered a **package** to the defendant Alfredo  
20 Agrelo."

21 I repeat, that the government if it established  
22 the first two essential elements under the conspiracy count,  
23 count one, must also have proved beyond a reasonable doubt  
24 the commission of at least one of those two overt acts, before  
25 you may convict on count one.

Those are the instructions I mean to give you at this stage, at least on the rules applicable to the two crimes alleged in this indictment. I do want to proceed now to some general observations that affect the way you will deliberate together and some of the concerns that you undoubtedly will be discussing in the juryroom.

One topic that is always germane to the concerns of any trier of the facts or any juror, is the subject of credibility. We rely here as in our law suits generally, on the testimony of witnesses, people who were present or involved, in order to attempt to learn the truth about the events that were involved in the lawsuit.

So that credibility is a matter of importance. Though it is important, it is not a technical or legalistic subject. People trained in the law do not actually have any special competence or expertise in deciding questions of credibility.

In our system, jurors like you are brought everyday to the courthouse in the belief that they will exercise their everyday good sense that they bring to their own important affairs and will, in that way, achieve together sound judgments as to credibility.

You have heard the witnesses and you have observed them as they testified. You will be asking together some

1  
2 fairly obvious questions about did the witness appear to you  
3 to be truthful and candid and forthright? Or did he seem  
4 evasive or shifty, or for any reason suspect? Did the  
5 witness appear to know what he was talking about? And did  
6 he appear to you to intend to tell you accurately what he knew?  
7 Was he consistent or self-contradictory? Did some of the  
8 things he told you seem to you to be incorrect and, if that  
9 were so, how major or minor were the discrepancies, the errors?

10           You may consider, you would whether we included  
11 it in the jury instructions or not, what motive or interest any  
12 witness may have had to tell you anything other than the  
13 absolute truth. In and out of the courtroom, we are in the  
14 habit of gauging the interest or involvement of people when  
15 we have to make a judgment as to how accurately and truthfully  
16 they are telling us what it is they tell us. So you will  
17 do that here.

18           Obviously, the possession of an interest in the  
19 case or subject matter doesn't disqualify a person from serving  
20 as a witness. If it did, we would simply rule we would not let  
21 anybody interested testify and then commonly, you could not  
22 find out any of the things that give rise to law suits.

23           So, I have mentioned that it is not a disqualifying  
24  
25

1 ar 27

2 factor or one that necessarily shows untruthfulness, but  
3 simply a reminder to you of one among many things that you  
4 will take into account in appraising the credibility of the  
5 witnesses.

6 Also, on this subject of interest, there is one  
7 aspect of the evidence to which you will want to pay some  
8 special attention. You have heard during the testimony and  
9 also since then, things about the witness Anibal Romeo, who  
10 testified for the prosecution.

11 You know that Romeo became a paid informer after he  
12 was himself apprehended in engaging in apparently unlawful  
13 narcotics transactions. You were told that he hopes to help  
14 his own situation and relieve his own troubles by cooperating  
15 with officials engaged in the enforcement of the narcotic  
16 laws.

17 I think you also know from your common experience  
18 that the government frequently deems itself compelled to rely  
19 upon the testimony of an informant, and of persons who have  
20 themselves engaged in criminal conduct, in order to apprehend  
21 and prosecute others so engaged.

22 The government takes the position and I think it is  
23 fair to say that there is no basic quarrel with that position,  
24 that it must take witnesses as it finds them, in undertaking  
25 to enforce criminal laws. So there is no prohibition, certainly,

1 ar 28

2 against the use of informant's testimony in criminal cases.

3 At the same time, you must be instructed -- you are  
4 instructed -- that you are to scrutinize such testimony with  
5 particular care and to treat it with particular caution in  
6 determining whether it is credible. You want to take into  
7 account what evidence and arguments you have heard as to what  
8 the motives of Mr. Romeo were or may have been when he gave  
9 you the testimony that you heard.

10 Was h's testimony fabricated in whole or in part?  
11 Induced by benefits that had already been conferred or he  
12 has hopes of receiving? Did he lie because of some promise  
13 or belief that he would receive favorable consideration in  
14 that way concerning his own difficulties with the law? Or  
15 did he, as a matter of conscience or for whatever other  
16 reason, take the stand with the purpose of telling you the  
17 truth in whole or in part?

18 Did he believe that it would be best for himself  
19 by making false accusations or did he believe it best for  
20 himself to tell truthfully about things that he knew first-  
21 hand?

22 In short, with these special observations for  
23 your consideration when you deal with Mr. Romeo, as when you  
24 deal with all the witnesses you have heard, you will eventually  
25 weigh all the circumstances surrounding the testimony of the

1 ar 29

521

2 witness, in making your judgment together as to credibility.

3 Ultimately, you will consider all things that your  
4 common sense and experience directs you to consider. You  
5 are not confined to the factors and the notions that I have  
6 mentioned. They are intended as suggestive and intended to  
7 provoke your own thoughts together about these witnesses.  
8 You in your sovereign authority of the facts, are the sovereign  
9 judges of credibility.

10 If you believe that any witness has wilfully lied  
11 to you as to any material fact, it is within your authority  
12 to disregard all of that witness' testimony, or to give  
13 credence to such parts of it as you think should be credited  
14 and as you think assist you in your ultimate objective, which  
15 is to find out the truth.

16 Now, in doing that, in weighing credibility, and in  
17 all the things on which you are soon to proceed to deliberate  
18 together, have in mind that in this institution of jury  
19 trial, there are twelve of you and that there is a funda-  
20 mental and obvious purpose in having twelve. It is expected  
21 that you will reason together. It is expected that in per-  
22 forming that solemn responsibility, each of you will feel  
23 entitled and obliged to contribute the benefit of your own  
24 judgment.

25 At the same time, it is expected that you will

A 55

1 ar 30

2 exchange views with your fellow jurors. You will plan to be  
3 prepared to listen coolly and rationally to the views of your  
4 fellow jurors.

5 If you find in the course of the deliberations that  
6 some view you held at some point has been shown rationally  
7 to be incorrect, you won't hesitate to change it. At the  
8 same time, if you conscientiously hold a view, and you are  
9 not persuaded that it is wrong, you are not expected to yield  
10 your judgment just because you may happen at any particular  
11 moment to be out-numbered or out-voted.

12 If, while you are deliberating, you have a problem  
13 that leads you to think you ought to hear again any of the  
14 testimony, send us a note about that through your foreman  
15 and we will have the reporter find it and it will be read to  
16 you.

17 If you need to hear again or have amplified any  
18 of these instructions, send a note about that and we will try  
19 to take care of that.

20 If you need to see any of the exhibits, again send  
21 a note and we will find whatever it is you need and send it  
22 to you.

23 For purposes of all such matters that may cause you  
24 to send us notes, it is the obligation of the lawyers and the  
25 judge to be on deck and available to you and we will plan to

perform that responsibility. Let me just say since we have not made arrangements for our lunch delivery, when yours is delivered we will be informed of that and we will all plan to take about an hour and at that time, we will be unavailable.

Otherwise, it is our task to be available to work with you in any way that is necessary and you may assume that is being done. It may sometimes take a period of time to respond to your notes, it is because more often than laymen realize, jury notes are liable to require some consideration or work, including some searching by the reporter, and you should assume that kind of effort accounts for the delay.

There are two counts and that means that your objective is to reach a separate decision, separate verdict, on each of them if you can.

The practice in this court is to have the verdict delivered orally through the foreman of the jury and if and when you have a verdict, it will be taken in that fashion by the clerk with respect to each count separately.

If during your deliberations you find yourselves divided and have some occasion to send us a note about anything, do not include any word in your note about how the vote stands. That is a private subject for the juryroom and not one on which we ought to be advised or involved.

I have come to the end of these instructions. I am

1 ar 32

2 going to ask you to be patient just a couple of more minutes  
3 while I invite counsel to come up and tell me whether there  
4 are any exceptions, as we say, or any other things they may  
5 want me to tell you.

6 Gentlemen, come to the side bar.

7 (At the side bar.)

8 MR. CAREY: No exceptions, your Honor.

9 I don't recall hearing your Honor say that the  
10 verdict should be unanimous.

11 MR. AIDALA: I join in that, your Honor.

12 THE COURT: All right.

13 Anything else?

14 MR. CAREY: I have nothing further.

15 THE COURT: Mr. Aidala?

16 MR. AIDALA: Well, initially I object to your  
17 Honor's entire charge, as well as I except to all the prior  
18 adverse rulings on the part of the defendant.

19 Now, in so far as your Honor's charge is concerned,  
20 as it relates to the presumption of innocence, I do not believe  
21 that your Honor made clear to the jury that the presumption  
22 remains with the defendant through their deliberations in the  
23 juryroom and that it only falls if they finally reach a  
24 unanimous verdict indicating that his guilt has been estab-  
25 lished beyond a reasonable doubt. I ask your Honor to explain

1 ar 33

2 that to them.

3 I further object to your Honor's charge concerning  
4 conspiracy, in that your Honor did not make it clear that  
5 the jurors would have to find an agreement among the defendant  
6 and the two co-conspirators who are named in the indictment,  
7 namely Agrelo and Castillo.

8 The explanation offered to the jurors would seem to  
9 indicate that if the jurors found that Romeo and Rivera en-  
10 tered into some type of conspiracy to purchase narcotics,  
11 that that would make the defendant Rivera guilty of a con-  
12 spiracy among himself and the two defendants, for which he  
13 stands charged. I think it should be made clear that any  
14 agreement would have to be an agreement between the defendant  
15 Rivera and the co-defendants named in the indictment.

16 I further except to your Honor's charge concerning  
17 aiding and abetting in that, again, your Honor did not dis-  
18 tinguish that if, for example, Rivera was aiding and abetting  
19 Romeo and Nieves to find a purchaser, that he would not be  
20 guilty.

21 The explanation offered to the jury would indicate  
22 that even if they found his alleged aiding and abetting was  
23 that of aiding Nieves and Romeo, they nevertheless could find  
24 him guilty of aiding and abetting the other two co-defendants.  
25 I think it is unclear and a distinction should be made.

1 ar 34

2 Neither Nieves nor Romeo are charged in this con-  
3 spiracy. They have not been accused of any crime and cer-  
4 tainly it has been defendant's position that he stands as the  
5 agent of Romeo and Nieves and not of the other two co-  
6 defendants.

7 Again, in the explanation about the conspiracy,  
8 your Honor mentioned if some two or more, I think you men-  
9 tioned, including the defendant, agreed to commit the act,  
10 your Honor did not distinguish which two or more; namely it  
11 would be the agreement between Agrelo and Castillo.

12 Furthermore, it was not clear that the defendant  
13 had to be one of the necessary parties to the agreement. The  
14 impression left is the jury were it to find that the agreement  
15 was between Castillo and Agrelo, that since it was two or  
16 more that agreed, they can find Rivera is also guilty.

17 It hasn't been made clear to them that Rivera had  
18 to be one of the parties agreeing with either Castillo and  
19 Agrelo, or both.

20 Those are my exceptions, your Honor.

21 THE COURT: I think I will overrule them without  
22 discussing them at length.

23 Does the government have any comment or position on  
24 any of those?

25 mr. carey: The government has no position and no

1 ar 35

2 comment.

3 (In open court.)

4 THE COURT: I should mention, ladies and gentlemen,  
5 that in order to reach any verdict, either way on either  
6 count, it must be unanimous. I trust you will have that in  
7 mind in your deliberations.

8 In line with what I said, the unanimous verdict,  
9 if and when you reach it, must represent the judgment of each  
10 one of you, in your own wisdom and conscience. But to make  
11 a decision, it must be unanimous.

12 Swear the marshals.

13 (Marshals sworn by the clerk of the court.)

14 THE COURT: We will assume, ladies and gentlemen,  
15 that you will have your lunch and we will be excused for a  
16 period.

17 (Jury retired to deliberate at 1:18 p.m.)

18 THE COURT: I want to mention, gentlemen, that Mr.  
19 Swanciger and I have a practice with respect to notes from  
20 the jury as follows: When there is a note he calls me.  
21 Normally I have to read to counsel while I am making my way  
22 down to the courtroom so that you will be generating whatever  
23 advise you have about handling it. There are variations, for  
24 example, when the jury sends out a verdict in a note, when  
25 I don't have it read to counsel until later, but normally, as

1 ar 36

2 I said, it will be read to you and in that way, by the time I  
3 arrive, you may be able to formulate your position on what-  
4 ever subject is raised in the note.

5 As I said, we are now going to lunch and we should  
6 be back within an hour. Otherwise, I take it that you will  
7 be on deck for the jury.

8 (Recess.)

9 THE COURT: Just to keep the record straight,  
10 earlier this afternoon the jury sent a note asking for the  
11 transcripts of tapes and I understand that, in my absence,  
12 you agreed on sending those in and that was done and the  
13 record should reflect that.

14 Mark the jury note as a court exhibit.

15 (Note marked as Court exhibit one.)

16 THE COURT: Now, we have another note which I under-  
17 stand has been read to you, saying, "Conspiracy, possession,  
18 aiding and abetting, clarification."

19 I assume that the best I can do, unless somebody  
20 has a better idea, is to read to the jury those parts of the  
21 charge.

22 Does anybody have a different view?

23 MR. AIDALA: I simply want to state, point out, that  
24 I think my concern that I expressed after your Honor's charge  
25 has been borne out. I think that it was not entirely clear

1 ar 37

2 in so far as the conspiracy and the aiding and abetting, the  
3 distinction, namely, where I pointed out before, that the  
4 jury must find, if they are to find the defendant guilty, he  
5 was in a conspiracy and agreement with the two co-defendants,  
6 that he was aiding and abetting the two co-defendants as  
7 opposed to Nieves and Romeo, and I would now again emphasize  
8 and request that the court make clear that distinction.  
9

10 THE COURT: I don't believe there is any substance  
11 in that, so I don't think it is useful for us to keep repeating  
12 it. You have your exception.

13 I don't think this jury, unless we really ought to  
14 give up the jury system, is going to find Mr. Rivera guilty of  
15 aiding and abetting Mr. Romeo or Mr. Nieves, either on the  
16 charge or arguments made to them, or the evidence, I just  
17 don't understand that. So let's do it as I said.

18 (Jury returned to the courtroom at 3:40 p.m.)

19 (Note marked as court exhibit No. 2.)

20 THE COURT: Ladies and gentlemen, we have your note,  
21 which is brief and to the point. The first thing you list is  
22 conspiracy, then possession and aiding and abetting.

23 As to the first, do you mean you want to have the  
24 concept of conspiracy or the whole charge on that subject?  
25 I am not perfectly clear what you want covered.

JUROR NO. 7: Your directive and in the concept and

1 ar 38

2 the way you explained it to us.

3 (Portions of charge re-read.)

4 (Jury left the courtroom at 3:50 p.m.)

5 THE COURT: So long as we are here, gentlemen and  
6 before I take leave of you temporarily, I want to tell you  
7 that I am under some considerable pressure for reasons un-  
8 related to this case, to suspend at about five o'clock and  
9 I would like to do that, unless either of you find it over-  
10 poweringly objectionable. That is to say, if we don't have  
11 a verdict, I would propose to suspend for the day and have  
12 the jury resume in the morning. Any objection to that that  
13 I ought to hear?

14 MR. CAREY: The government most respectfully defers  
15 to your Honor's judgment in that matter.

16 MR. AIDALA: I would have no objection.

17 THE COURT: If it gets much later than that -- I  
18 am not going to keep the jury overnight -- and some of the  
19 women particularly get a little edgy and if we have not heard  
20 from them before, I will come down around five o'clock and  
21 plan to adjourn for the day. We may, if that happens, continue  
22 tomorrow across the hall.

23 (The following took place at 4:15 p.m.)

24 THE COURT: Let's have the jury in. WE have a note  
25 which indicates a verdict, but I will take it in open court,

1 ar 39

2 in more or less the usual way.

3 (Jury present.)

4 THE COURT: Mr. Foreman, we have your note which  
5 indicates you have reached a verdict and you have written  
6 it on there, but I want to confirm that is your verdict in  
7 open court.

8 The note indicates that you find the defendant  
9 guilty on count one and guilty on count two. Is that your  
10 verdict?

11 THE FOREMAN: That is right, your Honor.

12 THE COURT: That is the jury's verdict?

13 THE FOREMAN: That is the jury's verdict.

14 THE COURT: Mr. Aidala, do you wish the jury polled?

15 MR. AIDALA: Yes, I do, your Honor.

16 THE CLERK: Ladies and gentlemen of the jury,  
17 listen to your verdict as it stands recorded, you say you  
18 find the defendant guilty on counts one and two. Is that  
19 your verdict?

20 (Each juror affirmed the verdict.)

21 THE COURT: All right, ladies and gentlemen, it is  
22 late and it is getting dark and I don't want to keep you ex-  
23 cept that on behalf of the court, I want to thank you for  
24 your service in this case.

25 (Jury excused.)

1 ar 40

2 THE COURT: We will mark the note which contains  
3 the jury's verdict as an exhibit.

4 (Court exhibit No. 3 marked.)

5 MR. AIDALA: Your Honor, I move to set aside the  
6 verdict on the ground that it is against the weight of the  
7 evidence.

8 THE COURT: That motion is denied.

9 THE COURT: We had set a sentencing date in the  
10 case of the other two defendants who pled guilty and is it  
11 appropriate to set the same date for the sentence of Mr.  
12 Rivera, or is there any reason why not?

13 MR. AIDALA: Mr. Rivera indicates, Judge, that he  
14 would appreciate it if the court would set a different date.  
15 He doesn't want to be with the other two.

16 THE COURT: All right, I will respect that desire.

17 The other two are on the second of January. Why  
18 don't we make it January 4 at 9:45 a.m., but I will request  
19 that the pre-sentence report in all three cases be available  
20 to me by the 28th of December. I think that pushes the  
21 Probation Office a little bit, but I would like to study  
22 all three defendants simultaneously.

23 The defendant has been held since his arrest and  
24 indictment as I understand it and I believe there is no reason  
25 to change it now. Therefore, he is remanded.

1 ar 40 A

532A

2 Is there anything else we have to do at this time,  
3 gentlemen?

4 MR. CAREY: Nothing, your Honor.

5 - - -

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 GWL

2 UNITED STATES DISTRICT COURT  
3 SOUTHERN DISTRICT OF NEW YORK

4 - - - - -X

5 UNITED STATES OF AMERICA, :

6 -against- : 73 Cr. 941

7 RAMON RIVERA, :

8 Defendant. :

9 - - - - -X

10 New York, New York  
11 January 4, 1974

12 B e f o r e:

13 HON. MARVIN E. FRANKEL,

14 District Judge.

15 A p p e a r a n c e s:

16 PAUL J. CURRAN, ESQ.,  
United States Attorney,  
17 MICHAEL Q. CAREY, ESQ.,  
Assistant United States Attorney.

18 LOUIS AIDALA, ESQ.,  
19 Attorney for defendant.

1 GW2

2 THE CLERK: Sentencing, United States of America  
3 versus Ramon Rivera.

4 Government ready?

5 MR. CAREY: Government is ready, your Honor.

6 THE CLERK: Defendant ready?

7 MR. AIDALA: The defendant is ready for sentence,  
8 your Honor.

9 THE COURT: All right, gentlemen. I have been  
10 over the presentence report.

11 Mr. Carey, is there anything you want to add?

12 MR. CAREY: Your Honor, the government has  
13 nothing to add.

14 THE COURT: Mr. Aidala?

15 MR. AIDALA: I assume the report would indicate,  
16 your Honor, the defendant was originally born in San Turci,  
17 Puerto Rico and then came to the United States. He is  
18 single, although he does have a mother who does reside in  
19 the city. He does have a number of arrests. However,  
20 I believe that the report should indicate, your Honor,  
21 that I think he was only convicted one prior time.

22 THE COURT: The report indicates two convictions.

23 MR. AIDALA: Two. He was arrested.

24 THE COURT: It may make a difference. I will tell  
25 you the report indicates he got six months in 1967 for

1 GW3

2 for grand larceny of an automobile, and in 1970 six months  
3 for criminal impersonation and criminal possession of stolen  
4 property.

5 If those are not correct, you ought to correct  
6 them now. They could make a difference.

7 MR. AIDALA: Judge, I believe I stand corrected.  
8 There were two convictions, although I believe he had been  
9 arrested a number of times.

10 What I would ask the Court to pay particular  
11 attention to is the alleged role of Mr. Rivera is charged  
12 with playing in the crime with which he was charged. I  
13 think your Honor is probably aware, since the trial was not  
14 too long ago, that the facts indicate, which came out during  
15 the course of the testimony, and I believe they indicated  
16 that Mr. Rivera never had actual possession of the alleged  
17 narcotics, and I think that if we can place Mr. Rivera in  
18 any type of level of those participating in any illegal  
19 activity, I think his position would be that of the lowest  
20 member at any level.

21 I think it seems to me at least quite clear the  
22 part he played was that of being an individual who acted  
23 as a conduit, so to speak, and found a buyer or buyers --  
24 excuse me -- or buyers who joined together with a potential  
25 seller.

1 GW4

2 I think at least one point in the trial, based on  
3 the tape recordings, the benefit that Mr. Rivera would  
4 gain from the completion of that transaction is quite  
5 clear where it was indicated after the transaction was com-  
6 pleted and the buyer had obtained possession of the alleged  
7 narcotics --

8 THE COURT: Let's just make sure that all your  
9 immortal words get down.

10 (Pause.)

11 MR. AIDALA: From the narcotics which the buyer  
12 was to purchase, Mr. Rivera would have gotten a certain  
13 portion of that, I suppose, as his payment, if you can  
14 call it that, for having found a seller for the buyer.  
15 I think there was a point on the tapes where that was dis-  
16 closed where Mr. Rivera indicated once the transaction was  
17 completed, then the buyer would have his and Mr. Rivera  
18 would get part of his share from it.

19 Mr. Rivera was in the lowest level, if you would  
20 consider or evaluate him with respect to the two other  
21 defendants who were referred to as the two Cuban individuals.

22 For that reason, I ask your Honor to be as lenient  
23 as possible with Mr. Rivera in sentencing him and to show  
24 whatever mercy the Court can show to him.

25 THE COURT: Mr. Rivera, you have a right to speak

1 GW5  
2 for yourself before you are sentenced and I would listen to  
3 anything that you might want to say at this time.

4 THE DEFENDANT: No comment.

5 THE COURT: Well, I have taken into account what  
6 Mr. Aidala has just stressed. I think it is correct that  
7 Mr. Rivera may have been the least important participant  
8 in this crime. The crime nevertheless is a serious one.  
9 Congress provided for a prison sentence of up to fifteen  
10 years for this offense, plus a fine, and Mr. Rivera may  
11 or may not know that the co-defendants who pled guilty, whose  
12 records were more serious than his and who probably played  
13 a bigger part in this particular crime, were sentenced to  
14 terms of five years each the day before yesterday.

15 Having in mind all the circumstances and exercising  
16 such leniency as I think the Court is permitted to exercise  
17 in these circumstances, Mr. Rivera will be sentenced to a  
18 term of imprisonment for two years on each count, those  
19 terms to run concurrently, and the Court will, as the law  
20 requires, impose in addition a three-year special parole  
21 term on each count, again to run concurrently.

22 Mr. Rivera, you were convicted after a trial. You  
23 have a right to appeal from this judgment. I now remind  
24 you of that right, and I will instruct Mr. Aidala to  
25 confer with you about that and to see to it that if you

1 GW6

2 wish to appeal a notice of appeal is filed on your behalf.

3 Mr. Aidala, are you retained or assigned?

4 MR. AIDALA: I was assigned, your Honor.

5 THE COURT: You were assigned. Well, you know  
6 that your assignment continues until or unless you are  
7 relieved by the Court of Appeals, so I will ask you to  
8 continue, as I must say you have done thus far, to safe-  
9 guard Mr. Rivera's rights to the best of your ability.

10 All right, that is the judgment, gentlemen.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

WITNESS INDEX

539

<u>Name</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Anibal Romeo	25	63	124	129
Michael Gray	138	150	177	179
Robert J. Nieves	233	256		
Robert Palombo	269	276	287	
Nicholas Figueroa	293	300	305	
Robert Palombo (recalled)	306	308		
Paul Sennett.	311	315	321	
Michael Gray (recalled)	323	329	343	345
Anibal Romeo (recalled)	347	390		
Mary Elena Cardenas	406			
S. Raphael Halperin	420	426	433	

EXHIBIT INDEX

<u>Government</u>	<u>Identification</u>	<u>In Evidence</u>
1	58	290
1A	58	290
2	291	291
9,10,11	326	
3A,4A,5A		407
12		407

JUDGMENT AND COMMITMENT

[ Same Section ]

On this 4th day of January, 1974 came the attorney for the government and the defendant appeared in person and by Louis Aidala, Esq.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty by a jury has been convicted of the offense of unlawfully, wilfully and knowingly combining, conspiring, confederating and agreeing with others to violate Section 812, 841(a)(1) and 841(b)(1)(A) of Title 21, U.S. Code. It was part of said conspiracy that the said defendant unlawfully, wilfully and knowingly distributed and possessed with intent to distribute Schedule I and II narcotic drug controlled substances. Unlawfully, intentionally and knowingly possessed with intent to distribute a Schedule II narcotic controlled substance. (Title 21, U.S. Code, Section 812, 841(a)(1), 841(b)(1)(A) and Title 18, U.S. Code, Section 2.),

as charged in counts 1 and 2 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS on each of counts 1 and 2 to run concurrently with each other.

Pursuant to the provisions of Section 841 of Title 21, U.S. Code, defendant is placed on Special Parole for a period of THREE (3) YEARS on each of counts 1 and 2 to run concurrently with each other in addition to said term of imprisonment.

~~XXXXXXXXXXXXXXXXXXXX~~

MICROFILM

JAN 8 1974

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

*Marvin E. Frankel*  
MARVIN E. FRANKEL

*Raymond F. Burghardt*  
United States District Judge.  
RAYMOND F. BURGHARDT

Clerk.

COPY RECEIVED  
PAUL  
MAR 20 1974  
U.S. ATTORNEY  
S.D. DIST. OF N.Y.

J. CURRAN